No. 06-939
Title: Chamber of Commerce of the United States, et al., Petitioners
v.
Edmund G. Brown, Jr., Attorney General of California, et al.
Docketed: January 8, 2007
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (03-55166, 03-55169)
Decision Date: September 21, 2006
Questions Presented

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Dec 7 2006	Application (06A597) to extend the time to file a petition for a writ of certiorari from December 20, 2006 to January 5, 2007, submitted to Justice Kennedy.
Dec 12 2006	Application (06A597) granted by Justice Kennedy extending the time to file until January 5, 2007.
Jan 5 2007	Petition for a writ of certiorari filed. (Response due February 7, 2007)
Jan 31 2007	Order extending time to file response to petition to and including March 9, 2007, for all respondents
Mar 7 2007	Brief amici curiae of National Right to Work Legal Defense Foundation, Inc., et al. filed.
Mar 8 2007	Waiver of right of respondents American Federation of Labor and Congress of Industrial Relations and the California Labor Federation to respond filed.
Mar 9 2007	Brief amici curiae of Associated Builders and Contractors, Inc., et al. filed.
Mar 9 2007	Brief of respondents Edmund G. Brown, Jr., Attorney General of California, et al. in opposition filed.
Mar 9 2007	Brief amicus curiae of Associated Builders and Contractors of California filed.
Mar 20 2007	Reply of petitioners Chamber of Commerce of the United States, et al. filed. (Distributed)
Mar 21 2007	DISTRIBUTED for Conference of April 13, 2007.
Apr 16 2007	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
Oct 19 2007	Brief amicus curiae of United States filed.
Oct 31 2007	DISTRIBUTED for Conference of November 20, 2007.
Nov 20 2007	Petition GRANTED.
Dec 11 2007	The time within which to file the joint appendix and petitioners' brief on the merits is extended to and including January 9, 2008.
Dec 11 2007	The time within which to file respondents' brief on the merits is extended to and including February 12, 2008.
Jan 9 2008	Joint appendix filed. (Statement of costs filed)
Jan 9 2008	Brief of petitioners Chamber of Commerce of the United States of America, et al. filed.
Jan 15 2008	Brief amici curiae of Healthcare Association of New York State, Inc., et al. filed.
Jan 15 2008	Letter from counsel for respondents submitting corrected list of "State Respondents" received.
Jan 16 2008	Brief amicus curiae of United States filed.
Jan 16 2008	Brief amici curiae of Associated Builders and Contractors, Inc., et al. filed.
Jan 16 2008	Brief amici curiae of National Right to Work Legal Defense Foundation, Inc., et al. filed.

Jan 16 2008	Brief amicus curiae of American Hospital Association filed.
Jan 16 2008	Brief amicus curiae of Cato Institute filed.
Jan 22 2008	SET FOR ARGUMENT ON Wednesday, March 19, 2008
Feb 1 2008	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Feb 4 2008	Record received from U.S.C.A. for 9th Circuit. (1 envelope)
Feb 5 2008	CIRCULATED.
Feb 5 2008	Record received from U.S.D.C. for the Central District of California from the Chambers of Judge Raymond C. Fisher. (2 boxes)
Feb 12 2008	Brief of respondents American Federation of Labor and Congress of Industrial Organizations and the California Labor Federation filed. (Distributed)
Feb 12 2008	Brief of respondents Edmund G. Brown, Jr., Attorney General of California, et al. filed. (Distributed)
Feb 19 2008	Brief amici curiae of AARP, et al. filed. (Distributed)
Feb 19 2008	Brief amici curiae of New York, et al. filed. (Distributed)
Feb 25 2008	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Mar 3 2008	Reply of petitioners Chamber of Commerce, et al. filed. (Distributed)
Mar 19 2008	Argued. For petitioners: Willis J. Goldsmith, New York, N.Y.; and Thomas G. Hungar, Deputy Solicitor General, Department of Justice, Washington, D.C. (for United States, as amicus curiae.) For respondents: Michael Gottesman, Washington, D.C.

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No. 06-

IN THE

Supreme Court of the United States

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, *ET AL.*,

Petitioners,

v.

BILL LOCKYER, *ET AL.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

STEPHEN A. BOKAT
ROBIN S. CONRAD
SHANE BRENNAN
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337
Of Counsel

WILLIS J. GOLDSMITH
(*Counsel of Record*)
JONES DAY
222 East 41st Street
New York, NY 10017
(212) 326-3649

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

QUESTION PRESENTED

Is the State of California's regulation of noncoercive employer speech about union organizing, California Assembly Bill 1889, Cal. Gov't Code §§ 16645.2, 16645.7, preempted by federal labor law?

PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

The parties before this Court are petitioners the Chamber of Commerce of the United States of America; California Chamber of Commerce; Employers Group; California Hospital Association (*fka* California Healthcare Association); California Manufacturers and Technology Association; California Association of Health Facilities; Aging Services of California (*fka* California Association of Homes & Services for the Aging); Marksherm Corporation; Zilaco, Inc.; and Front Porch (*fka* Internext Group) ("petitioners"); and respondents Bill Lockyer, Attorney General, in his capacity as Attorney General of the State of California; California Department of Health Services; Frank G. Vanacore, as the Chief of the Audit Review and Analysis Section of the California Department of Health Services; Diana M. Bonta, R.N., Dr., Ph.D, as the Director of the California Department of Health Services; California Labor Federation, AFL-CIO; and American Federation of Labor and Congress of Industrial Organizations ("respondents"). The other parties in the Ninth Circuit were Bettec Corporation; Zilaco; Beverly Health & Rehabilitation Services, Inc. (*dba* Beverly Manor Costa Mesa); and Del Rio Sanitarium, Inc. (*fka* Del Rio Healthcare, Inc.).

None of the petitioners has a parent company or publicly held company owning 10 percent or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

The Chamber of Commerce of the United States of America, *et al.*, respectfully petition for a writ of certiorari to review the *en banc* judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the United States District Court for the Central District of California was issued on September 16, 2002, and is reported at 225 F. Supp. 2d 1199 (Pet. App. 140a-149a).

The first panel opinion of the United States Court of Appeals for the Ninth Circuit was issued on April 20, 2004, and is reported at 364 F.3d 1154 (Pet. App. 114a-139a). The Ninth Circuit's order granting rehearing and withdrawing the first opinion was issued on May 13, 2005, and is reported at 408 F.3d 590 (Pet. App. 157a-158a). The second panel opinion of the Ninth Circuit was issued on September 6, 2005, and is reported at 422 F.3d 973 (Pet. App. 58a-113a). The Ninth Circuit's order granting rehearing *en banc* was issued on January 17, 2006, and is reported at 435 F.3d 999 (Pet. App. 155a-156a); its order withdrawing the second panel opinion was issued on February 9, 2006, and is reported at 437 F.3d 890 (Pet. App. 153a-154a). The *en banc* opinion of the Ninth Circuit was issued on September 21, 2006, and is reported at 463 F.3d 1076 (Pet. App.1a-57a). On November 20, 2006, the Ninth Circuit entered an order staying its mandate pending this Court's disposition of this case. Pet. App. 151a-152a.

JURISDICTION

The *en banc* opinion of the United States Court of Appeals for the Ninth Circuit was issued on September 21, 2006. Pet. App. 1a-57a. On December 7, 2006, petitioners timely filed an application to extend the time to file a petition for certiorari from December 20, 2006, to January 5, 2007. On December 12, 2006, Justice Kennedy granted the

application. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The principal provisions involved are the Supremacy Clause of the United States Constitution, U.S. CONST., art. VI, cl. 2, section 8(c) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158(c), and California Assembly Bill No. 1889 ("AB 1889"), Cal. Gov't Code §§ 16645-16649, each of which is set out in full in the Appendix to this Petition. Pet. App. 159a-167a.

STATEMENT

This is a preemption case arising under the NLRA. In response to union lobbying efforts, California enacted AB 1889 in 2000 to forbid employers receiving state funds of virtually every type, including state grant and program funds, from using those funds to "assist, promote, or deter union organizing." Petitioners—joined in the Ninth Circuit by *amicus* the National Labor Relations Board ("NLRB")—have argued that this California statute is preempted under the NLRA in part because it deters an activity, noncoercive employer speech about union organizing, that federal labor policy protects and encourages. In a divided *en banc* decision, the United States Court of Appeals for the Ninth Circuit sustained AB 1889.

A. The National Labor Relations Act

The NLRA, 29 U.S.C. §§ 151-169, was enacted in 1935 to federalize and bring uniformity to labor-management relations. *See NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144 (1971) (the NLRA is designed "to obtain uniform application of its substantive rules and to avoid the diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies") (internal quotation marks and citation omitted); *Amalgamated Ass'n of St. Elec. Ry. & Motor Coach Employees of Am. v. Lockridge*, 403 U.S. 274, 286 (1971) (the NLRA is "a comprehensive

national labor law . . . for stabilizing labor relations conflict and for equitably and delicately structuring the balance of power among competing forces"). Although the NLRA contains no express preemption provision, "[i]t is by now commonplace that in passing the NLRA Congress largely displaced state regulation of industrial relations." *Wis. Dep't of Indus., Labor & Human Relations v. Gould Inc.*, 475 U.S. 282, 286 (1986). In particular, this Court has held that the NLRA preempts state regulation of activity (i) that Congress intended to remain unregulated, *see Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers v. Wis. Employment Relations Comm'n*, 427 U.S. 132 (1976) ("*Machinists*"), and (ii) protected, prohibited, or arguably protected or prohibited by the NLRA, *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959) ("*Garmon*").

Employees have the right under the NLRA to "join" or "to refrain" from joining a union. 29 U.S.C. § 157. To become an exclusive collective bargaining representative, a union must be supported by a majority of employees in an appropriate bargaining unit. This is typically done through a secret-ballot election overseen by the NLRB. *Id.* § 159. Campaigns preceding these representation elections often are vigorously contested, with employees being inundated with union arguments for, and employer arguments against, unionization. *See generally Linn v. United Plant Guard Workers of Am.*, 383 U.S. 53, 58 (1966).

When Congress amended the NLRA in 1947, it added section 8(c), which provides that "[t]he expressing of any views, argument, or opinion, or the dissemination thereof, . . . shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit." 29 U.S.C. § 158(c). This Court has stated that "the enactment of § 8(c) manifests a congressional intent to encourage free debate on issues dividing labor and management." *Linn*, 383 U.S. at 62.

B. California Assembly Bill 1889

AB 1889, signed into law by Governor Gray Davis in 2000, forbids employers that receive either a state "grant" or over $10,000 from a "state program" from using those funds "to assist, promote, or deter union organizing," Cal. Gov't Code §§ 16645.2, 16645.7, which is defined as "any attempt by an employer to influence the decision of its employees in this state or those of its subcontractors regarding either . . . [w]hether to support or oppose a labor organization that represents or seeks to represent those employees . . . [or] [w]hether to become a member of any labor organization," *id.* § 16645(a).[1] This proscription applies to "any expense, including legal and consulting fees and salaries of supervisors and employees, incurred for research for, or preparation, planning, or coordination of, or carrying out, an activity to assist, promote, or deter union organizing." *Id.* § 16646(a).

There are several exceptions to AB 1889's spending ban. Covered employers are free under AB 1889 to use "state funds" to enter into a "voluntary recognition agreement"

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[1] The preamble to AB 1889 states that "[i]t is the policy of the state not to interfere with an employee's choice about whether to join or to be represented by a labor union" and that "[i]t is the intent of the Legislature in enacting this act to prohibit an employer from using state funds and facilities for the purpose of influencing employees to support or oppose unionization." Cal. Stats. 2000, Ch. 872, § 1. Although only the spending bans related to state grants and programs are currently before this Court, *see* Dist. Ct. Docket No. ("Dkt.") 168 (Ninth Circuit Supplemental Excerpts of Record ("SER") 758-770), AB 1889 also precludes reimbursements to employers for any union-related activity, Cal. Gov't Code § 16645.1(a); prohibits employers from speaking to employees working on state contracts about union organizing, *id.* § 16645.3(a); imposes a spending ban on employers with state contracts of over $50,000, *id.* § 16645.4(a); and bars employers from using certain state property to meet with employees about union organization, *id.* § 16645.5(a).

with a union, thereby allowing that union to bargain collectively on behalf of the employer's workforce without having to win a secret-ballot election. Cal. Gov't Code § 16647(d). In addition, AB 1889 does not apply to employer expenditures related to grievance handling; negotiating or administering a collective bargaining agreement; allowing a labor organization access to employer property; or performing an activity required by law or a collective bargaining agreement. *Id.* § 16647(a)-(c).

All employers must provide a certification that they will abide by AB 1889's spending prohibitions. Cal. Gov't Code §§ 16645.2(c), 16645.7(b). Employers that have sufficient private funds to speak about union-organizing attempts are subject to several additional regulatory requirements:

Segregated Accounting Systems. Employers must create separate accounts for funds traceable to a state grant or program and implement special accounting procedures to trace all expenditures related to union organizing. That is so because if employers make an expenditure relating to union organizing from an account with commingled funds, AB 1889 creates an irrebuttable presumption that "state funds" have been (illegally) used on a *pro rata* basis. Cal. Gov't Code § 16646(b).

Employee Salaries. Employers must ensure that employees who spend any portion of their work time on unionization matters are paid for such time with funds that cannot be traced to "state funds" in order to comply with AB 1889's prohibition with respect to employee salaries. Cal. Gov't Code § 16646(a).

Recordkeeping and Disclosure. Employers must maintain records "sufficient" to show that no "state funds" were used to assist, promote, or deter union organizing. Cal. Gov't Code §§ 16645.2(c), 16645.7(c), and employers must provide these records to the California Attorney General upon request, *id.* §§ 16645.2(c), 16645.7(c).

Employers may be sued under AB 1889 by the California Attorney General or "any state taxpayer," which could include a union involved in an ongoing effort to organize an employer's workforce. Cal. Gov't Code § 16645.8(a). In addition to injunctive and other equitable relief, a court may award treble damages—*i.e.*, disgorgement plus a civil penalty of twice that amount. *Id.* §§ 16645.2(d), 16645.7(d), 16645.8(a). Although any damages award goes to the state, a prevailing private plaintiff can recover attorney's fees and costs. *Id.* § 16645.8(d).

An example of a "state program" to which AB 1889 applies is Medi-Cal, California's Medicaid program. Dkt. 30 (SER 11-12). Medi-Cal provides health insurance for certain low-income and elderly persons, and reimbursements to employers that provide healthcare services for Medi-Cal insurees are therefore governed by AB 1889. Petitioner Zilaco, Inc., for example, receives over 90 percent of its revenue from Medi-Cal. Dkt. 43 (SER 69-72). Other employers in California, such as United Cerebral Palsy, are entirely dependent upon Medi-Cal for their earnings. Dkt.32 (SER 46-49); *see also* Dkt. 118 (SER 499-525) (identifying over 500 employers that rely exclusively on Medi-Cal reimbursements).

C. Proceedings in the District Court

Petitioners filed this action in 2002 in the United States District Court for the Central District of California arguing that AB 1889 is preempted by the NLRA and seeking declaratory and injunctive relief. Respondents California Department of Health Services and individual California officials were named in the complaint; respondents the California Labor Federation, AFL-CIO, and the American Federation of Labor and Congress of Industrial Organizations intervened.

On cross-motions for summary judgment, the district court entered partial final judgment in favor of petitioners declaring sections 16645.2 and 16645.7 of the California

Government Code preempted under the *Machinists* doctrine because they "regulate[] employer speech about union organizing under specified circumstances, even though Congress intended free debate." Pet. App. 147a.

D. Decisions of the Court of Appeals

The United States Court of Appeals for the Ninth Circuit issued three opinions in this case: two panel opinions holding that the contested provisions of AB 1889 were preempted by the NLRA, and an *en banc* opinion holding that they were not.

First panel opinion. The first Ninth Circuit opinion, authored by Judge Fisher, held that AB 1889 was preempted under *Machinists*. The court, explaining that "open and robust advocacy by both employers and employees must exist in order for the NLRA collective bargaining process to succeed," held AB 1889 preempted because it "directly regulates the union organizing process itself and imposes substantial compliance costs and litigation risk on employers who participate in that process." Pet. App. 127a.

Second panel opinion. The Ninth Circuit panel granted rehearing and withdrew the first opinion. The second opinion, written by Judge Beezer, held that AB 1889 was preempted under *Machinists* and *Garmon*. It held that "by discouraging employers from exercising their protected speech rights," AB 1889 "operates to significantly empower labor unions as against employers" and "runs roughshod over the delicate balance between labor unions and employers as mandated by Congress through the [NLRA]." Pet. App. 81a. Judge Fisher, author of the first opinion, dissented from the second opinion and would have remanded to consider preemption of several of AB 1889's enforcement provisions, which he stated "appear to have an impermissibly intrusive effect on the NLRA's balance . . . between employer and employee." Pet. App. 110a.

En banc opinion. The Ninth Circuit granted rehearing *en banc* and withdrew its second opinion. Over the dissent of

three judges, the *en banc* court, in an opinion by Judge Fisher, held that AB 1889 was not preempted by the NLRA in any respect. The *en banc* court rejected respondents' argument that there could be no preemption because the State of California in AB 1889 was not acting as a regulator, but rather as a proprietor (or "market participant"). The court held that "California's condition on the use of its funds constitutes 'regulation[],'" Pet. App. 7a, because "[t]he statute's scope indicates a general state position of neutrality with regard to organizing, not a narrow attempt to achieve a specific procurement goal," Pet. App. 12a. It nonetheless determined that AB 1889 was not preempted under either *Machinists* or *Garmon*.

The *en banc* majority held that *Machinists* was inapplicable because AB 1889 involves the use of state funds, an activity which "by definition [is] not controlled by the free play of economic forces." Pet. App. 17a. It determined, in any event, that "an employer has and retains the freedom to spend its own funds however it wishes," and that AB 1889's effect on noncoercive employer speech is therefore "indirect and incidental." Pet. App. 17a & 18a n.10. It also noted that *Machinists* applies only to "activity left free from *all* regulation," and determined that the NLRB's "extensive regulation of organizing activities demonstrates that *organizing*—and employer speech in the context of organizing—is not such a zone." Pet. App. 19a (emphases in original).

Garmon did not apply, the Ninth Circuit *en banc* held, because noncoercive employer speech is neither actually nor arguably protected by the NLRA. It held that section 8(c) of the NLRA "does not *grant* employers speech rights" but "simply prohibits their noncoercive speech from being used as evidence of an unfair labor practice." Pet. App. 23a (emphasis in original). It held that even were noncoercive employer speech protected under the NLRA, AB 1889, as an exercise of the state's spending power, falls within an exception to *Garmon* preemption for state regulation of

conduct that involves "'interests so deeply rooted in local feeling and responsibility that . . . we [cannot] infer that Congress ha[s] deprived the States of the power to act.'" Pet. App. 30a (quoting *Garmon*, 359 U.S. at 243; brackets in original). The *en banc* majority recognized that *Garmon*'s "deeply rooted" exception had never been applied to a state spending decision, but determined that a state "has a responsibility and a right to spend its treasure . . . based on principles and guidelines that its democratically elected legislature deems to be appropriate." Pet. App. 31a.

In so holding, the Ninth Circuit expressly rejected the views of the NLRB, which, as *amicus*, argued that AB 1889 is preempted under both *Machinists* and *Garmon*. The NLRB explained that "the federal policy, expressed in NLRA Section 8(c), [is] to insure both to employers and labor organizations full freedom to express their views to employees on labor matters." NLRB *Amicus* Brief at 6, *Chamber of Commerce v. Lockyer* (9th Cir. Nos. 03-55166, 03-55169) (internal quotation marks and citation omitted), *available at* 2003 WL 22330725. The NLRB argued that AB 1889 should be preempted because it "reflects California's labor-driven policy decision to use state spending power to pressure private employers to conform to the state model that conflicts with the federal model." *Id.* at 15.

Judge Beezer, joined by Judges Kleinfeld and Callahan, dissented. In addition to reiterating several of the arguments made in the second panel decision, the dissent cited an intervening decision from Seventh Circuit Court of Appeals, *Metropolitan Milwaukee Association of Commerce v. Milwaukee County*, 431 F.3d 277, 278-79 (7th Cir. 2005), for the proposition that "regulation that specifically targets and substantially affects the NLRA bargaining process will be preempted, even if such regulation comes in the form of a restriction on the use of state funds." Pet. App. 51a (Beezer, J., dissenting).

REASONS FOR GRANTING THE WRIT

The Ninth Circuit's decision—upholding California's spending restriction that was concededly designed for the regulatory purpose of deterring noncoercive employer speech concerning unionization—is based on two fundamentally erroneous preemption analyses. *First*, the Ninth Circuit incorrectly ruled that the NLRA's express authorization and protection of this noncoercive speech in section 8(c) does not foreclose direct state regulation and punishment of such speech. *Second*, the Ninth Circuit erred in ruling that, because the regulation here comes in the form of a spending restriction, it does not impose a cognizable burden on employers' noncoercive speech.

Both of these preemption rulings are in direct conflict with decisions of the Second and Seventh Circuits, as well as this Court's precedents and the considered views of the NLRB, which Congress entrusted to bring uniformity to the regulation of labor-management relations. As discussed in Part I *infra*, both Circuits recognize that, under *Machinists* and *Garmon*, state regulation of noncoercive employer speech is preempted because states "are not permitted to regulate activities that are either expressly permitted . . . by the Act or that are reserved [by the Act] for market freedom." *Metro. Milwaukee*, 431 F.3d at 278 (internal quotation marks and citation omitted). Moreover, both Circuits and the NLRB also recognize that, under *Gould*, 475 U.S. at 288-89, NLRA preemption applies not only to direct regulation, but to state spending restrictions where, as the *en banc* court held here, the purpose of the restriction is "regulatory" and unrelated to any "interest in the efficient procurement of goods and services," Pet. App. 11a. In such circumstances, the proprietary exception identified in *Building & Construction Trades Council v. Associated Builders & Contractors of Massachusetts/Rhode Island, Inc.*, 507 U.S. 218 (1993) ("*Boston Harbor*"), does not apply, and the state's regulatory exercise of its spending power is subject to ordinary preemption analysis.

More fundamentally, as discussed in Part II *infra*, the decision below is completely at odds with this Court's repeated admonition that a state may not use either its spending or regulatory power to alter the NLRA's balance between labor and management. AB 1889's regulatory burden on employers who seek to discuss the drawbacks of unionization obviously and directly impedes Congress's decision, embodied in section 8(c) of the NLRA, to authorize employers to express opinions to deter union organizing efforts, so long as they contain "no threat of reprisal or force or promise of benefit." 29 U.S.C. § 158(c). Since such regulatory efforts would plainly be preempted if they were done through direct regulation, California has sought to accomplish the same objective through the backdoor by attaching conditions to state funds. But, as the Court's unanimous decision in *Gould* made clear concerning a similar backdoor effort to leverage public coffers to impose a regulatory burden unrelated to any legitimate proprietary interest, using the power of the purse to disrupt the labor-management balance struck by Congress is also preempted.

As a practical matter, moreover, the decision below, if left unattended, will have a particularly significant negative effect on national labor policy and relations. As discussed in Part III *infra*, following the lead of California and New York, at least fifteen other states have proposed legislation that would impose similar spending restrictions on employers' noncoercive labor speech. It is therefore particularly important that the Court clarify now the respective state and federal roles in labor-management regulation and foreclose states' ongoing efforts to displace both Congress's judgment concerning the desirability of noncoercive employer speech and the NLRB's preeminent role in shaping a uniform, integrated, and federal regulatory scheme for labor relations.

I. THE NINTH CIRCUIT'S PREEMPTION ANALYSIS CONFLICTS WITH THAT OF THE SECOND AND SEVENTH CIRCUITS AND DISREGARDS THE CONSIDERED VIEWS OF THE NLRB

A. There Is A Circuit Split On Whether The NLRA Protects Noncoercive Employer Speech About Union Organizing From State Interference

The Ninth Circuit determined in this case that neither *Machinists* nor *Garmon* preemption applied to AB 1889 because noncoercive employer speech about union organizing is *not* an activity that the NLRA intended to "protect" or keep free from governmental regulation. The *en banc* court held that *Garmon* was inapplicable because noncoercive employer speech about unionization is not "arguably protected" by the NLRA: "[S]ection 8(c) [of the NLRA] does not *grant* employers speech rights" but merely prohibits "noncoercive speech from being used as evidence of an unfair labor practice." Pet. App. 23a (emphasis in original). The Ninth Circuit also determined that *Machinists* did not apply to AB 1889 because "employer speech in the context of organizing" is not an area intended to be free from regulation, but rather is "extensive[ly] regulat[ed]" by the NLRB. Pet. App. 19a.

In contrast, the Second Circuit held shortly thereafter that state interference with noncoercive employer speech is subject to preemption under both *Machinists* and *Garmon*, and rejected the Ninth Circuit's contrary interpretation of section 8(c) of the NLRA. *See Healthcare Ass'n of N.Y. State, Inc. v. Pataki*, ___ F.3d ___, 2006 WL 3499469 (2d Cir. Dec. 5, 2006). It therefore held preempted portions of New York Labor Law section 211-a which, like AB 1889, provides that "no monies appropriated by the state" to employers may be used "to encourage or discourage union organization."

In conflict with the Ninth Circuit, the Second Circuit held that, under *Garmon*, "section 8(c) itself protects employer speech and that state action impinging on this protection may be preempted." *Healthcare Ass'n*, 2006 WL 3499469, at *7. It expressly rejected the Ninth Circuit's holding in this case that "section 8(c) is a mere place-holder [for the First Amendment] with no labor law function of its own." *Id.* Rather, the Second Circuit recounted that "[m]any courts . . . have affirmed that section 8(c) not only protects constitutional speech rights, but also serves a labor law function of allowing employers to present an alternative view and information that a union would not present." *Id.* at *9 (collecting cases). It also specifically rejected the Ninth Circuit's assertion that noncoercive employer speech is not "protected" by section 8(c) because the protection is in the form of immunity from an unfair labor practice finding: "It is surely a familiar concept that one way of granting rights is to state that the government cannot punish certain conduct. For instance, the First Amendment does not explicitly grant freedom of speech, but instead says that 'Congress shall make no law . . . abridging the freedom of speech.'" *Id.* at *10. The *Healthcare Association* court thus held that "section 8(c) embodies a policy of encouraging free speech in the labor context" and that "such a policy necessarily entails freedom from state meddling." *Id.*

With respect to *Machinists* preemption, the Second Circuit held that portions of the New York law were invalid for the same reasons they ran afoul of *Garmon* preemption. The court recognized that these two doctrines are "conceptually complementary" since "*Garmon* preemption applies to conduct that is regulated by the NLRA and *Machinists* preemption applies to conduct that the NLRA left unregulated." *Healthcare Ass'n*, 2006 WL 3499469, at *18. In the context of noncoercive employer speech, they "tend toward the same point" because "the *protection* afforded by section 8(c) is to leave employer speech largely *unregulated*." *Id.* (emphasis added). According to the court,

Congress, in section 8(c), took a "laissez-faire" approach to noncoercive employer speech, thereby prohibiting both NLRB and state restrictions on such speech. *Id.* at *17.

In short, the Second Circuit squarely (and correctly) held that Congress's decision to restrict only coercive speech about unions demonstrates both that noncoercive speech was "left to the free play of economic forces" under *Machinists* and that such speech is "protected" by the NLRA against state interference under *Garmon*. This is clearly irreconcilable with the Ninth Circuit's holding that allowing NLRB regulation of *coercive* speech somehow indicates a desire to permit state regulation of *noncoercive* speech, *see* Pet. App. 19a, and its conclusion that noncoercive speech was unprotected by 8(c), *see* Pet. App. 23a.

As discussed in Part I.B *infra*, the Seventh Circuit and the NLRB also expressly agree that the NLRA preempts state regulation of noncoercive employer speech—such as a law that forbade employers from "requir[ing] their employees to attend meetings . . . in which the employer expresses his opposition to unionization"—because "federal law *allows*" such speech. *Metro. Milwaukee*, 431 F.3d at 280 (emphasis added). This Court should therefore grant certiorari to resolve this conflict, particularly since the Ninth Circuit's determination that neither *Machinists* nor *Garmon* precludes state regulation of noncoercive employer speech plainly authorizes *direct* state and local regulation of this speech.

B. There Is A Circuit Split On Whether State Spending Decisions That Interfere With Noncoercive Employer Speech Are Preempted

The Ninth Circuit also held that, even if *Garmon* and *Machinists* preemption were applicable to direct regulation of noncoercive employer speech, AB 1889 does not burden such speech because "an employer has and retains the freedom to spend its own funds how it wishes; it simply may not spend state grant and program funds on its union-related advocacy." Pet. App. 17a. This alternative holding conflicts

with the Second Circuit's decision in *Healthcare Association* that New York Labor Law section 211-a was preempted insofar as it prohibited employers from using public funds that they had "earned" to speak about unionization. *Healthcare Ass'n*, 2006 WL 3499469, at *12.[2]

Specifically, the Second Circuit held that states could not impose restrictions on "an employer's use of monies earned from state contracts" or from other state programs where the state's reimbursement of the employers can "avoid [union-related] expenses by designating such costs as non-reimbursable." *Healthcare Ass'n*, 2006 WL 3499469, at *15. Thus, states cannot impose funding restrictions where its "reimbursement obligations . . . do not include any costs associated with [prohibited employer speech about unionization]." *Id.* at *19.[3] Such limitations impermissibly "deter[] employers from the exercise of their rights under section 8(c)." *Id.* at *15.

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[2] The Second Circuit held that New York Labor Law section 211-a was not preempted insofar as it applied to money that the state had given employers as a "gift." *Healthcare Ass'n*, 2006 WL 3499469, at *12 n.7. It also assumed, apparently because the plaintiffs did not challenge restrictions on "grants," that "grants" were such "gifts." *Id.* at *12. This conclusion does not affect the conflict with the Ninth Circuit, since that Circuit upheld AB 1889's restrictions on monies *earned* under state programs and the like. We nonetheless note that the vast majority of grants are not mere gratuities. Most grantees earn their money by providing to the state either a direct benefit (*e.g.*, grantee makes proposals for improving state infrastructure) or a societal benefit that inures to the health and welfare of state citizens (*e.g.*, grantee researches a cure for AIDS). NLRA preemption, moreover, turns on the straightforward question whether the state is exercising its spending power in a regulatory manner that interferes with federal labor policy, not on the amorphous issue whether the funds restricted were intended as gifts or in exchange for services rendered.

[3] The Second Circuit remanded the case for factual determinations regarding the exact nature of the funds regulated by New York Labor Law section 211-a. *See Healthcare Ass'n*, 2006 WL 3499469, at *16.

Accordingly, the Second Circuit preempted restrictions attached to "money earned by the employer," such as money from a contract or earned in exchange for service to the public, such as reimbursement for providing health care. In such situations, the state's money is plainly not "subsidizing" any employer speech and any employer expenditures related to union organizing cannot possibly increase the state's costs. Therefore, "the State's asserted proprietary interest in saving money is inapplicable." *Healthcare Ass'n*, 2006 WL 3499469, at *19.

In contrast, the *en banc* majority in the Ninth Circuit upheld restrictions on "money earned" from "state programs," including, as noted in the Statement *infra*, Medi-Cal reimbursement for health care services in nursing homes and the like. *See* Pet. App. 35a n.23. Had the Ninth Circuit employed the Second Circuit's analysis, it would have deemed such restrictions on reimbursements to health care providers preempted, particularly since, as the *en banc* majority itself emphasized, "allowable costs under MediCal" expressly exclude "activities directly related to influencing employees respecting unionization." Pet. App. 35a n.23 (emphases deleted); *see also* Dkt. 32 (SER 47-49). Since the public money provided for the reimbursement excludes from the outset any cost related to unionization, there is simply no *fiscal* reason to attach an additional spending restriction on the reimbursement money that is provided. Because the state's programmatic costs cannot possibly increase by virtue of the employer's union-related expenditures, AB 1889's restriction on the monies provided do not, as the Ninth Circuit conceded, in any way "reflect California's interest in the efficient procurement of goods and services." Pet. App. 11a. The statute's spending restriction is simply a naked attempt to leverage state funds to deter employers from trying to influence employee choice about whether to join a union.

For this reason, the Ninth Circuit's holding here also directly conflicts with the Seventh Circuit's holding in

Metropolitan Milwaukee. In that case, the Seventh Circuit held preempted under the NLRA a county ordinance that regulated the labor relations of employers that contracted with the county. The court specifically condemned the provision of the ordinance that forbade contracting employers from holding meetings "intended to influence an [employee's] decision in selecting or not selecting a bargaining representative" because federal law "allows" such meetings. 431 F.3d at 280. Relying upon this Court's decision in *Gould*, the Seventh Circuit held that "the spending power may not be used as a pretext for regulating labor relations" and that a state "cannot use its spending power as a handle for regulating the labor relations of recipients of County money." *Id.* at 278-80. Because the county's "motive" behind the spending restriction was "dissatisfaction with the balance that the [NLRA] strikes between labor and management," rather than fiscal savings, the court held that its effort to "give the union a leg up" relative to what "federal law permits" is "the kind of favoritism that the [NLRA] anathematizes." *Id.* at 280. Thus, as the dissenters below pointed out, the *en banc* decision here is irreconcilable with *Metropolitan Milwaukee*'s holding that "regulations that specifically target and substantially affect the NLRA bargaining process will be preempted, even if such regulation comes in the form of a restriction on the use of state funds." Pet. App. 51a (Beezer, J., dissenting). AB 1889 is no less pretextual than the ordinance held preempted in *Metropolitan Milwaukee*.

The NLRB made precisely this point in its *amicus* brief to the Ninth Circuit, arguing that AB 1889 was preempted because, "while [the statute] is nominally about state spending decisions, [it] is really an impermissible regulatory attempt to substitute California labor policy for existing federal labor policy." NLRB *Amicus* Brief at 7. Specifically, the Board explained that the stated premise of AB 1889—that "employer speech for or against unionization is inherently an interference with employee choice"—is

contrary to longstanding federal labor policy, which "favors robust debate of union representation issues as a means of enhancing the opportunity for employees to make a free and informed choice." *Id.* at 6-7. The NLRB thus concluded that AB 1889 should be preempted because "California . . . is using its spending powers to handicap employer speech rights that Congress believed to be a positive force in informing employee choice." *Id.* at 13. This "reasonable construction" by the Board is entitled to "considerable deference," *NLRB v. City Disposable Sys. Inc.*, 465 U.S. 822, 829 (1984), because, as this Court has frequently recognized, "[i]t is the Board on which Congress conferred the authority to develop and apply fundamental national labor policy," *Beth Israel Hosp. v NLRB*, 437 U.S. 483, 500 (1978).

Thus, according to the Seventh Circuit and the NLRB, use of the state spending power to interfere with the employer freedoms that the NLRA authorizes—specifically, the right to speak against unionization in a noncoercive way—is preempted. In contrast to the Ninth Circuit, the Seventh Circuit invalidates spending restrictions, such as AB 1889, whose true purpose is influencing labor-management relations, rather than a proprietary purpose satisfying the "market participant" exception. This Court should grant certiorari to resolve this conflict, as well as the conflict with the Second Circuit's *Healthcare Association* decision, and to clarify the appropriate application of preemption analysis to regulatory exercises of the spending power.

II. THE NINTH CIRCUIT'S DECISION IS IN CONFLICT WITH THIS COURT'S PREEMPTION PRECEDENTS

This Court's precedents squarely foreclose the Ninth Circuit's conclusions about the general scope of NLRA preemption and the circumstances in which spending restrictions are preempted.

First, it is crystal clear that state laws are preempted if they alter or have the potential to alter the labor-management

balance struck in the NLRA by prohibiting employers, unions, or employees from engaging in conduct—such as noncoercive employer speech—that is expressly authorized by the federal Act. Such state laws impermissibly stand "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Machinists*, 427 US at 151 (internal quotation marks and citation omitted); *accord Livadas v. Bradshaw*, 512 U.S. 107, 120 (1994). More fundamentally, a hodge-podge of differing state labor regulations undermines the basic "purpose of the Act, [which] was to obtain uniform application of its substantive rules and to avoid the diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies." *Nash-Finch*, 404 U.S. at 144 (internal quotation marks and citation omitted). This "settled preemption principle," applicable to all state laws, has its "greatest force" with respect to a state law, such as AB 1889, "regulating the relations between employees, their unions, and their employer." *N.Y. Tel. Co. v. N.Y. State Dep't of Labor*, 440 U.S. 519, 533 (1979) (plurality opinion); *Boston Harbor*, 507 U.S. at 224.

Thus, as every other lower court and the NLRB have recognized, state restrictions on employer actions that are expressly blessed by the NLRA, such as AB 1889's restriction on noncoercive speech, are preempted under *Machinists* and/or *Garmon*. Since the NLRA prohibits only employer speech that tends to coerce employees, noncoercive speech cannot be restricted by states under *Machinists* because Congress intended that such speech be "one of the economic devices of . . . management" which "neither a state nor the NLRB" has any "flexibility" to "brand unlawful." *Machinists*, 427 U.S. at 144, 149. For essentially the same reason, the Ninth Circuit erred in

concluding that noncoercive speech was not "protected" under *Garmon*.[4]

The Ninth Circuit avoided this inescapable conclusion only by engaging in semantic gamesmanship. Specifically, it found that *noncoercive* employer speech was not intended to

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[4] The *en banc* majority reasoned that noncoercive speech is not "protected" by the NLRA because section 8(c) simply immunizes an employer from liability for engaging in such speech, rather than creating a "right" for employers analogous to employees' rights under section 7 of the Act. Pet. App. 22a-23a. But, of course, the NLRA does not "protect" an *employer's* freedoms by granting them any "rights" relative to their employees. Since, prior to the NLRA, employers already had the freedom to dictate employees' wages, hours, and terms and conditions of employment by virtue of their status as employers, it would make no sense to phrase their freedom to do so as a "right" "bestowed" by the federal government. Rather, employer freedoms, such as the freedom to engage in noncoercive speech, are "protected" by the NLRA by preventing government interference with that freedom, just as the First Amendment "protects" citizens' speech by preventing "Congress" from interfering with it. *See Healthcare Ass'n*, 2006 WL 3499469, at *7. This is why the Court has unambiguously stated that "non-coercive anti-union solicitation" is a "*right protected* by the so-called 'employer free speech' provision of § 8(c) of the [NLRA]." *NLRB v. United Steelworkers of Am.*, 357 U.S. 357, 362 (1958) (emphases added). Similarly, in applying *Garmon* preemption in *Linn*, this Court recognized that "the enactment of § 8(c) manifests a congressional intent to encourage free debate on issues dividing labor and management," 383 U.S. at 62, and limited state libel claims arising out of labor-management disputes to those involving malice and actual harm in order to "guard against . . . unwarranted intrusion upon free discussion envisioned by the Act," *id.* at 65.

Equally irrelevant is the *en banc* majority's observation that the free speech protected by 8(c) is "guaranteed by the First Amendment." Pet. App. 23a. It matters not whether section 8(c)'s "intent to encourage free debate on issues dividing labor and management" was enacted because Congress thought that such free speech is beneficial public policy or because it thought that this policy was compelled by the First Amendment. *See Linn*, 383 U.S. at 62. The only relevant point is that section 8(c) creates statutory protection for such speech in the labor context.

"be free from *all* regulation" under *Machinists* because the NLRB can regulate *coercive* employer speech. Pet. App. 19a. But, of course, this simply confirms that noncoercive speech is one of the "peaceful methods" available to an employer to deter unionization "free from government interference." *Machinists*, 427 U.S. at 154; *Golden St. Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 110-11 (1989).[5] As the *en banc* majority itself noted, this Court has squarely held that:

> [*Machinists*] cases rely on the understanding that in organization and collective bargaining, Congress determined both how much the conduct of unions and employers should be regulated and *how much it should be left unregulated*: The States have no more authority than the Board to upset the balance that Congress has struck between labor and management . . . .

Pet. App. 15a (quoting *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 751 (1985)) (emphases added). Since Congress left noncoercive speech unregulated, the states may not "upset that" balance" under *Machinists*.

The Ninth Circuit alternatively held that the statute's regulation of noncoercive employer speech was not preempted because California's regulatory goal was accomplished by imposing conditions on state funds, rather than through a generally applicable regulation affecting all employers. *See* Pet. App. 17a-19a. As this Court has squarely held, however, the fact that a state seeks to interfere

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[5] Even the *en banc* majority recognized that *Machinists* preempts a state law that, in the *collective bargaining* process, regulates employer action, including employer speech, that is permitted by the NLRA, even though the NLRB obviously regulates *prohibited* activities relating to the collective bargaining process. Pet. App. 13a-15a. The same is true for the union organizing process. Indeed, there is no support for the *en banc* majority's eventually aborted suggestion that *Machinists* is limited to collective bargaining. *See* Pet. App. 16a.

with NLRA-authorized actions through its "spending power rather than its police power" is a "distinction without a difference." *Gould*, 475 U.S. at 287. Rather, since the "'proper focus'" is on "'the conduct being regulated,'" not the method of regulation, it would "make little sense" to allow otherwise improper state interference with the NLRA's uniform scheme "simply because it operates through state purchasing decisions." *Id.* at 289 (quoting *Lockridge*, 403 U.S. at 292); *see also Garmon*, 359 U.S. at 243 ("[J]udicial concern has necessarily focused on the nature of the activities which the States have sought to regulate, rather than on the method of regulation adopted.").

Under *Gould*, it is impermissible for states to leverage public money to impose burdens on employers that are in addition to the proscriptions of the NLRA. *See* 359 U.S. at 287-89. Here, by burdening employers' noncoercive speech, AB 1889 imposes burdens that are plainly in addition to the NLRA's prohibition of coercive or retaliatory speech. Contrary the Ninth Circuit's view, it is no answer to suggest that California is simply refraining from "subsidizing" employer speech that it finds objectionable. By that logic, Wisconsin, in *Gould*, was simply refraining from subsidizing with its contracting dollars those who had repeatedly violated federal labor law. Indeed, Wisconsin's interference was far less disruptive of the federal scheme than AB 1889 because it only affected those who had *violated* federal norms, not, as here, those who are engaging in activity expressly permitted by federal law. In short, where, as here, spending restrictions are purposely designed to regulate labor relations, rather than to further state's proprietary interests, such funding conditions are preempted.[6]

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[6] For similar reasons, there is nothing to the Ninth Circuit's unprecedented assertion that states have a "deeply rooted" interest in depriving employers of the ability to spend money on union-related activity merely because those funds were received from the state. Again,

To be sure, the burden here is often less draconian than that in *Gould* because the state does not completely prohibit noncoercive employer speech, but only prohibits using a subset of the employers' funds for that purpose (*i.e.*, those received from the state). The Ninth Circuit viewed this distinction as dispositive. Although apparently agreeing that requiring employer neutrality towards unions as a "condition for *receipt* of state funds" would be impermissible interference, it found that "restricting the *use* of state funds" was acceptable because it did not constitute an impermissible burden on First Amendment rights. Pet. App. 17a. But this entirely misses the point. State imposition of *any* serious burden on NLRA-protected speech or activities interferes with conduct that Congress wanted unregulated, and is thus preempted. And there can be no question that AB 1889 imposes significant burdens with both the purpose and effect of coercing employer "neutrality" towards unionization.

Most obviously, with respect to employers, such as petitioner Zilaco Inc., that receive all or virtually all of their revenues for services provided under state programs, the statute does act as a *complete* ban on noncoercive speech. *See* Statement, *supra*. Such employers will simply not have

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the state has no interest, deeply rooted or otherwise, in regulating management's action towards unions because that is a federal concern. The "deeply rooted" interests recognized by *Garmon* and other cases are general state policies unrelated to industrial relations, which incidentally affect management-union relations. *See, e.g.*, *Garmon*, 359 U.S. at 247. Although states do have a legitimate interest in efficient and cost effective services, the court below itself acknowledged that this was not the purpose or effect of AB 1889. *See* Pet. App. 11a. Finally, states do not traditionally or typically impose conditions on an employer's use of its own money *after* it has received that money from the state for services rendered. To the contrary, it is a rare exception to the states' normal indifference to how recipients of state funds spend dollars received under contracts or state programs, and one which raises serious constitutional concerns. *See* pp. 27-28 *infra*.

sufficient funds from non-state sources to engage in the speech expressly authorized by the NLRA.[7]

In addition, AB 1889 plainly imposes severe burdens even on employers that do have sufficient funds from non-state sources to engage in NLRA-protected speech. The Ninth Circuit dismissed this argument solely on the grounds that the restrictions would not impose an impermissible First Amendment burden under *Rust v. Sullivan*, 500 U.S. 173 (1991). *See* Pet. App. 33a-34a. This analogy to First Amendment "unconstitutional conditions" cases, however, is misguided for two related reasons.

First, *Rust* and its progeny upheld funding restrictions because legislatures can "insist that public funds be spent for purposes" that further the government's legitimate programmatic ends. *Rust*, 500 U.S. at 196. Consequently, this "allows the Government to specify the [speech] deemed necessary for its legitimate objectives" and to require that grantees refrain from other speech. *Legal Servs. Corp. v.*

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[7] The *en banc* majority's sole response was its dismissive assertion that this complete ban was "solely the consequence of the employer's free-market choice" because "nothing prevents the employer from raising additional funds from a non-state source." Pet. App. 18a. Of course, it is equally true that "nothing prevents" a citizen from pursuing non-state employment and that nothing prevented the contractors in *Gould* from seeking non-state contracts. But this hardly negates the fact that forcing public employees or contractors to choose between either exercising their speech rights or foregoing public funds constitutes a serious burden on those rights. Indeed, in the First Amendment context, the Court has directly equated the rights of public employees and public contractors to be free from spending restrictions designed to prevent or penalize protected speech. *See Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668, 674 (1996) ("[T]he similarities between government employees and government contractors with respect to [free speech rights] are obvious.") And, of course, this Court has "long since rejected Justice Holmes' famous dictum, that a policemen 'may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.'" *Id.* (citation omitted).

Velazquez, 531 U.S. 533, 548 (2001). But here California does not have any *legitimate* regulatory interest in coercing or influencing an employer's federally-protected, non-threatening speech concerning unions. As established above, Congress affirmatively determined that noncoercive employer speech should not be regulated, so the state's effort to influence and burden such speech is preempted. The fact that the state's policy of coercing employer neutrality towards unions might not infringe the employer's First Amendment rights in no way answers the salient preemption question whether that policy impermissibly conflicts with federal labor policy. As *Gould* made clear, the only nonpreempted interest justifying state spending restrictions are proprietary interests that would be followed by any private market participant. Since the Ninth Circuit rightly held that the statute here does not even purport to reflect such fiscal interests, it is preempted.

Second, and in any event, the First Amendment cases plainly establish that limitations on a private entity's use of public funds do impose a "substantial restriction" on the private actor's speech—even if that restriction is constitutionally justified by the government's need to control its programmatic message. *See Velazquez*, 531 U.S. at 544. In *Velazquez*, for example, the Court found that restrictions on the lawsuits that could be brought by private LSC grantees with public funds were unconstitutional, even though those grantees were free to engage in that litigation with their own non-federal funds placed in "affiliate organizations." *See id.* at 556 (Scalia, J., dissenting). Here, a state-funded legal services provider, or even a private law firm paid by the state for representing the state's legal interests, would be barred from using those funds to deal with union organizing. This plainly constitutes a burden at least equivalent to that involved in *Velazquez* and the state's interest is much weaker here, since spending money on *internal* employee relations would not in any way affect or distort the legal services provided.

More specifically, in order to expend funds received from non-state sources, employers must abide by AB 1889's burdensome regulatory regime, bearing the cost of creating segregated accounts for funds derived from a state grant or program, and establishing a separate accounting system that tracks each expenditure related to union organizing and traces it to non-"state" funds. This Court has repeatedly held that the cost and practical difficulties of complying with regulations requiring such separate, segregated accounts "make[s] engaging in protected speech a severely demanding task" that "burdens First Amendment rights." *FEC v. Mass. Citizens for Life, Inc.* 479 U.S. 238, 255-56 (1986) (invalidating under the First Amendment federal statutory requirements to "establish a 'separate segregated fund'" and to comply with "[d]etailed record-keeping and disclosure obligations" in order to engage in independent political expenditures). While the Court has at times upheld laws requiring that speech be conducted through segregated accounts, it has only done so when "justified by a compelling state interest" and has uniformly recognized that such requirements "burden expressive activity." *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 658 (1990). It therefore simply cannot be disputed that AB 1889's requirement that "private" funds be segregated to engage in union-related activities creates a severe burden and "disincentive" to engage in such activities. *Id.* AB 1889 therefore plainly "stands as an *obstacle* to accomplishment and execution of the full purposes" of the NLRA, regardless whether it constitutes an unconstitutional burden under the First Amendment. *Livadas*, 512 U.S. at 120 (internal quotation marks and citation omitted; emphasis added).

In addition, AB 1889 authorizes taxpayer lawsuits, which may, for example, be brought by unions to gain leverage in an ongoing organizing dispute with an employer. A union can hale an employer into court simply by alleging that the employer's recordkeeping is "[in]sufficient," a critical term that AB 1889 does not define. At that point, the employer is

faced with the legal costs of defending itself, and the near-certainty of a discovery request into its financial and business records. More important, the employer faces the prospect of *treble* damages payable to the state and an award of attorney's fees.[8]

Moreover, whereas AB 1889 induces employers to capitulate to unionization by offering state funds for "voluntary recognition agreements," it deters employers from resisting union organization by imposing costly administrative requirements that must be followed on pain of treble damages. AB 1889 is thus an example of a "funding scheme [that] is 'manipulated' to have a 'coercive' effect on those who do not hold the subsidized position" on unions. *Velazquez*, 531 U.S. at 552 (Scalia J., dissenting) (quoting *Nat'l Endowment for Arts v. Finley*, 524 U.S. 569, 587 (1998)).

Finally, the Ninth Circuit's analysis is premised on the fundamentally erroneous notion that money which an employer receives from the state for services rendered to the state or its citizenry somehow remains the *state*'s money. But as the dissenting opinion below and the Second Circuit have correctly noted, money received from the state for goods or services is not the state's money any more than money received from a private purchaser remains the private purchaser's money after it has been transferred to the employer. Pet. App. 85a-87a (Beezer, J., dissenting); *Healthcare Ass'n*, 2006 WL 3499469, at *14-15. This is particularly true since the employer speech regulated here relates to its own internal operations, not to any message that the employer would deliver to the public as part of a government-funded program. Thus, "there is no

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[8] This concern is not hypothetical; before AB 1889 was enjoined by the district court, several unions filed or threatened to file lawsuits against employers. *See, e.g.*, Pet. App. 64a-65a; Dkt. 30 (SER 26-45).

programmatic message of the kind recognized in *Rust*" which government-funded service providers need to adhere to, so that the program can work as planned. *Velazquez*, 531 U.S. at 548. There is, indeed, no nexus at all between the government's programmatic goals and the employer's union-related speech and thus, unlike *Rust*, no conceivable basis for suggesting that the employer's speech "amount[s] to governmental speech." *Id.* at 541.

In sum, contrary to this Court's clear precedents, the Ninth Circuit erred in holding that even direct regulation of noncoercive speech is not preempted by the NLRA's express authorization of that speech and also in its alternative holding that the state's prohibition against engaging in such speech with state-derived funds is not a cognizable burden on that activity.

III. THIS CASE RAISES AN IMPORTANT QUESTION THAT WILL HAVE A SIGNIFICANT EFFECT ON FEDERAL LABOR POLICY

As this Court has explained, Congress enacted the NLRA, "a comprehensive national labor law," because of "the perceived incapacity of . . . state legislatures, acting alone, to provide an informed and coherent basis for stabilizing labor relations conflict." *Lockridge*, 403 U.S. at 286. The NLRA contains no express preemption provision, and it has therefore fallen on the judiciary to "translate[] into concreteness" which state regulations are, and which are not, displaced by supreme federal labor law. *Garmon*, 359 U.S. at 241. That is a vital task that merits this Court's consideration, as this Court has frequently noted in granting certiorari in NLRA preemption cases. *Livadas*, 512 U.S. at 116 (granting certiorari "to address the important questions of federal labor law implicated by the [state's] policy"); *N.Y. Tel.*, 440 U.S. at 527 (granting certiorari because of "[t]he importance of the question" whether the NLRA preempted a state unemployment-benefits law); *Nash v. Fla. Indus. Comm'n*, 389 U.S. 235, 237-38 (1967) (granting certiorari

"because of the important constitutional question involved, specifically whether the [state law] violates the Supremacy Clause of the Constitution (Art. VI cl. 2) because it allegedly 'frustrates' enforcement of the [NLRA]").

AB 1889 is part of a concerted effort to spur union organizing by both silencing anti-union employer speech and subsidizing employer neutrality in organizing campaigns. Accordingly, certiorari review here is particularly critical. As shown in Part I.B *supra*, AB 1889 is a viewpoint-based restriction that specifically targets anti-union speech. AB 1889's threat of union lawsuits and treble damages will chill speech that Congress and the NLRB deem essential if employees are to make informed decisions whether or not to bargain collectively. Notwithstanding AB 1889's direct and substantial interference with the federal scheme governing union organization, the Ninth Circuit here held that ordinary NLRA preemption analysis does not apply to regulatory exercises of the state spending power. That holding leaves a gaping hole in NLRA preemption given the amount of money states and localities expend each year (California, for example, annually expends over $127 billion, *see* http://www.ebudget.ca.gov/BudgetSummary/SCD/1249579.html (last visited Jan. 4, 2007)). Indeed, because the *en banc* court held that noncoercive employer speech is not an activity that is protected under *Garmon* or an activity left free from regulation under *Machinists*, its holding authorizes even *direct* regulation of noncoercive employer speech. It is thus no surprise that the General Counsel for respondent AFL-CIO called the Ninth Circuit's ruling "'a real win for organizing.'" 185 Daily Lab. Rep. (BNA) A-8 (Sept. 25, 2006).

AB 1889, moreover, is but one of a number of similar enacted and proposed state statutes that, in the aggregate, will impose substantial and idiosyncratic administrative burdens on employers that choose to oppose unionization. In addition to New York Labor Law section 211-a, similar legislation has been proposed in Arizona, Connecticut,

Florida, Georgia, Illinois, Indiana, Iowa, Louisiana, Maine, Massachusetts, Missouri, New Hampshire, North Dakota, Oregon, and Pennsylvania. Dkt. 66 (SER 77-281). Counties and any other local governmental entities with spending power may also follow suit. *See, e.g., Metro. Milwaukee*, 431 F.3d at 277. If AB 1889 "is valid, nothing prevents other States from taking similar action," and "[e]ach additional statute incrementally diminishes the Board's control over enforcement of the NLRA and thus further detracts from the integrated scheme of regulation created by Congress." *Gould*, 475 U.S. at 288-89. The *en banc* majority's sweeping opinion upholding AB 1889 threatens precisely the type of variegation that the NLRA intended to stamp out. *See Garner v. Teamsters, Chauffeurs & Helpers Local Union*, 346 U.S. 485, 490-91 (1953). AB 1889, in sum, is the wedge that will allow other states and localities to irremediably alter the federal labor policy favoring noncoercive employer speech, and this Court needs to intervene now.

CONCLUSION

The petition should be granted.

Respectfully submitted,

STEPHEN A. BOKAT
ROBIN S. CONRAD
SHANE BRENNAN
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337
Of Counsel

BRADLEY W. KAMPAS
SCOTT OBORNE
JACKSON LEWIS LLP
199 Fremont Street
10th Floor
San Francisco, CA 94105
(415) 394-9400
Of Counsel

WILLIS J. GOLDSMITH
(*Counsel of Record*)
JONES DAY
222 East 41st Street
New York, NY 10017
(212) 326-3649

GLEN D. NAGER
MICHAEL A. CARVIN
NOEL J. FRANCISCO
LUKE A. SOBOTA
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
(202) 879-3939
Counsel for Petitioners

January 5, 2007

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 03-55166

CHAMBER OF COMMERCE OF THE UNITED STATES; CALIFORNIA CHAMBER OF COMMERCE; EMPLOYERS GROUP; CALIFORNIA HEALTHCARE ASSOCIATION; CALIFORNIA MANUFACTURERS AND TECHNOLOGY ASSN.; CALIFORNIA ASSOCIATION OF HEALTH FACILITIES; CALIFORNIA ASSOCIATION OF HOME & SERVICES FOR THE AGING; BETTEC CORPORATION; MARKSHERM CORPORATION; ZILACO INC., ZILACO; DEL RIO HEALTHCARE, INC.; BEVERLY HEALTH & REHABILITATION SERVICES, INC. DBA BEVERLY MANOR COSTA MESA; INTERNEXT GROUP,
Plaintiffs-Appellees,

CALIFORNIA LABOR FEDERATION, AFL-CIO; AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS,
Intervenors-Appellants,

v.

BILL LOCKYER, ATTORNEY GENERAL, IN HIS CAPACITY AS ATTORNEY GENERAL OF THE STATE OF CALIFORNIA; DEPARTMENT OF HEALTH SERVICES; FRANK G. VANACORE, AS THE CHIEF OF THE AUDIT REVIEW AND ANALYSIS SECTION OF THE CALIFORNIA DEPARTMENT OF HEALTH SERVICES; DIANA M. BONTA, R.N., DR., PH.D, AS THE DIRECTOR OF THE CALIFORNIA DEPARTMENT OF HEALTH SERVICES,
Defendants.

No. 03-55169

CHAMBER OF COMMERCE OF THE UNITED STATES; CALIFORNIA CHAMBER OF COMMERCE; EMPLOYERS GROUP; CALIFORNIA HEALTHCARE ASSOCIATION; CALIFORNIA MANUFACTURERS AND TECHNOLOGY ASSN.; CALIFORNIA ASSOCIATION OF HEALTH FACILITIES; CALIFORNIA ASSOCIATION OF HOME & SERVICES FOR THE AGING; BETTEC

CORPORATION; MARKSHERM CORPORATION; ZILACO INC., ZILACO; DEL RIO HEALTHCARE, INC.; BEVERLY HEALTH & REHABILITATION SERVICES, INC. DBA BEVERLY MANOR COSTA MESA; INTERNEXT GROUP,
Plaintiffs-Appellees,

and

CALIFORNIA LABOR FEDERATION, AFL-CIO; AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS,
Intervenors-Appellants,

v.

BILL LOCKYER, ATTORNEY GENERAL, IN HIS CAPACITY AS ATTORNEY GENERAL OF THE STATE OF CALIFORNIA; DEPARTMENT OF HEALTH SERVICES; FRANK G. VANACORE, AS THE CHIEF OF THE AUDIT REVIEW AND ANALYSIS SECTION OF THE CALIFORNIA DEPARTMENT OF HEALTH SERVICES; DIANA M. BONTA, R.N., DR., PH.D, AS THE DIRECTOR OF THE CALIFORNIA DEPARTMENT OF HEALTH SERVICES,
Defendants-Appellants.

Appeal from the United States District Court for the Central District of California Gary L. Taylor, District Judge, Presiding.

Filed September 21, 2006.

Before SCHROEDER, Chief Judge, REINHARDT, BEEZER, KOZINSKI, KLEINFELD, HAWKINS, THOMAS, SILVERMAN, McKEOWN, WARDLAW, FISHER, PAEZ, RAWLINSON, CLIFTON and CALLAHAN, Circuit Judges.

Opinion by Judge FISHER; Dissent by Judge BEEZER.

FISHER, Circuit Judge.

The question before us is whether a state's exercise of its sovereign power to control the use of its funds conflicts with national labor policy as expressed in the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151-169. Specifically,

two provisions in a California statute forbid employers who receive state grant or program funds in excess of $10,000 from using those funds to assist, promote or deter union organizing. We hold that California's grant and program fund restrictions do not undermine federal labor policy, are not pre-empted by the NLRA and do not violate the First Amendment.

FACTUAL BACKGROUND

On September 28, 2000, California enacted Assembly Bill No. 1889, Cal. Gov't Code § 16645-16649 (collectively, "AB 1889"). The preamble of the statute declares:

> It is the policy of the state not to interfere with an employee's choice about whether to join or to be represented by a labor union. For this reason, the state should not subsidize efforts by an employer to assist, promote, or deter union organizing. It is the intent of the Legislature in enacting this act to prohibit an employer from using state funds and facilities for the purpose of influencing employees to support or oppose unionization and to prohibit an employer from seeking to influence employees to support or oppose unionization while those employees are performing work on a state contract.

§ 16645, Historical and Statutory Notes, Section 1 of Stats.2000, c. 872.

Two provisions of the California statute, sections 16645.2 and 16645.7, are at issue in this appeal.[1] Section 16645.2(a) bars private employers who are "recipient[s] of a grant of state funds" from "us[ing] the funds to assist, promote, or deter union organizing." Section 16645.7(a) bars "[a] private employer receiving state funds in excess of [$10,000] in any calendar year on account of its participation in a state

[1] The parties stipulated to the district court's entry of a partial final judgment as to preemption of § 16645.2 and § 16645.7 to facilitate prompt appellate review of the district court's preemption ruling regarding these two sections only.

program" from using program funds "to assist, promote, or deter union organizing." The phrase "assist, promote, or deter union organizing" includes "any attempt by an employer to influence the decision of its employees in this state or those of its subcontractors regarding . . . [w]hether to support or oppose a labor organization that represents or seeks to represent those employees . . . . [or] [w]hether to become a member of any labor organization." § 16645(a)(1)-(2). The statute specifies as prohibited "any expense, including legal and consulting fees and salaries of supervisors and employees, incurred for research for, or preparation, planning, or coordination of, or carrying out, an activity to assist, promote, or deter union organizing." § 16646(a). Expressly exempted from the statute's reach are "activit[ies] performed" or "expense[s] incurred" in connection with "[a]ddressing a grievance or negotiating or administering a collective bargaining agreement" and "[n]egotiating, entering into, or carrying out a voluntary recognition agreement with a labor organization." § 16647(a), (d).

The statute requires employers covered by sections 16645.2 or 16645.7 to certify that no state funds will be used to assist, promote or deter union organizing. § 16645.2(c), 16645.7(b). It also requires employers who make expenditures to assist, promote or deter union organizing to maintain and provide upon request "records sufficient to show that state funds have not been used for those expenditures." § 16645.2(c), 16645.7(c).[2] If an employer

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[2] Despite the absence of any finding by the district court that § 16645.2(c) and § 16645.7(c) are onerous, the dissent insists that these provisions entail "burdensome and detailed record-keeping," impose "seemingly impossible compliance burdens" and are "daunting." (Dissent at 1102, 1103.) The dissent even suggests that these provisions require "an employer [to] create and maintain two completely separate accounting and payroll systems." (Dissent at 1103.) The statute, however, does not require "employers to maintain records in any particular form," § 16648, and leaves employers free to design their

commingles state and other funds, the statute presumes that any expenditures to assist, promote or deter union organizing derive in part from state funds. § 16646(b).

Employers who violate sections 16645.2 or 16645.7 are subject to fines and penalties, which include the disgorgement of the state funds used for the prohibited purposes and a civil penalty paid to the state that is equal to twice the amount of those funds. § 16645.2(d), 16645.7(d). Suspected violators may be sued by the state Attorney General or by any private taxpayer. § 16645.8(a)-(c). Prevailing plaintiffs, and prevailing taxpayer intervenors who make substantial contributions to an action under this section, are "entitled to recover reasonable attorney's fees and costs."[3] § 16645.8(d).

In April 2002, plaintiffs-appellees (collectively, the "Chamber of Commerce") brought an action for injunctive and declaratory relief challenging the statute facially on

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accounting and payroll systems however they wish, provided only that they have "records sufficient to show that state funds have not been used" to assist, promote or deter organizing. § 16645.2(c), 16645.7(c). Moreover, the only expert testimony in the record on these provisions states that they provide employers "flexibility in establishing proper accounting procedures and controls," impose no burden greater than numerous other common grant restrictions and in fact "appear to be significantly less burdensome than the detailed requirements for federal grant recipients. . . ."

[3] The dissent finds it significant that the statute allows private taxpayers to sue suspected violators. (Dissent at 1102.) In this respect, the statute is no different from any number of other federal and state laws or qui tam causes that enable private attorneys general to help detect, punish and deter wrongdoing. In contrast to some such statutes (e.g., § 4 of the Clayton Act, 15 U.S.C. § 15), which encourage private suits by permitting plaintiffs to be awarded treble damages, AB 1889 only allows private litigants to recover attorney's fees and costs-the damages go to the state. *See* § 16645.8(d).

numerous grounds, including NLRA preemption. The AFL-CIO and others (collectively, the "AFL-CIO") intervened. In May 2002, the Chamber of Commerce moved for summary judgment. Defendants, who are the California Department of Health Services and state officials sued in their official capacity (collectively, "California"), filed cross motions for summary judgment in August 2002.

On September 16, 2002, the district court granted partial summary judgment in favor of the Chamber of Commerce. The district court determined that the NLRA preempted sections 16645.2 and 16645.7 under the Supreme Court's *Machinists* doctrine because the provisions "regulate[d] employer speech about union organizing under specified circumstances, even though Congress intended free debate." *Chamber of Commerce v. Lockyer,* 225 F.Supp.2d 1199, 1205 (C.D.Cal.2002); *see Lodge 76, Int'l Ass'n of Machinists v. Wisc. Employment Relations Comm'n,* 427 U.S. 132, 96 S.Ct. 2548, 49 L.Ed.2d 396 (1976). The district court entered judgment in January 2003 and issued an injunction prohibiting California and the AFL-CIO from taking any actions to enforce sections 16645.2 and 16645.7 against any employer subject to the NLRA. California and the AFL-CIO appealed.

A three-judge panel of our court affirmed the district court, but the panel then withdrew its opinion upon the grant of appellants' petition for panel rehearing. *Chamber of Commerce v. Lockyer,* 364 F.3d 1154 (9th Cir.2004), *withdrawn and reh'g granted,* 408 F.3d 590 (9th Cir.2005). On rehearing, a divided panel issued a second opinion, *Chamber of Commerce v. Lockyer,* 422 F.3d 973 (9th Cir.2005), which was in turn vacated and withdrawn from publication for reconsideration en banc. *See Chamber of Commerce v. Lockyer,* 435 F.3d 999 (9th Cir.2006); *Chamber of Commerce v. Lockyer,* 437 F.3d 890 (9th Cir.2006). We now reverse the district court's judgment that the NLRA preempts the California statute and vacate the court's injunctive order.

STANDARD OF REVIEW

We review de novo a district court's grant of summary judgment and preemption analysis. *See Winterrowd v. Am. Gen. Annuity Ins. Co.*, 321 F.3d 933, 937 (9th Cir.2003); *Ting v. AT & T*, 319 F.3d 1126, 1135 (9th Cir.2003). "A facial challenge to a legislative Act is . . . the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *Rust v. Sullivan*, 500 U.S. 173, 183, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991) (internal quotation marks and citation omitted).

DISCUSSION

I. Market Participant Exception

Before addressing the merits of the preemption issue, we must first decide whether California's condition on the use of its funds constitutes "regulation." "A prerequisite to preemption [under the NLRA] is a finding that the state or local action in question constitutes *regulation* of labor relations between employers and employees." *Alameda Newspapers, Inc. v. City of Oakland*, 95 F.3d 1406, 1413 (9th Cir.1996). The NLRA "does not preempt actions taken by a state when it . . . acts as a mere proprietor or market participant." *Dillingham Constr. N.A., Inc. v. County of Sonoma*, 190 F.3d 1034, 1037 (9th Cir.1999) (citing *Bldg. & Constr. Trades Council of the Metro. Dist. v. Associated Builders & Contractors of Mass./R.I., Inc.*, 507 U.S. 218, 227, 113 S.Ct. 1190, 122 L.Ed.2d 565 (1993) (" *Boston Harbor* ")). We conclude that California has acted as a regulator in enacting sections 16645.2 and 16645.7, and that the market participant exception does not apply.

Two Supreme Court cases define the scope of the market participant exception: *Wisconsin Department of Industry v. Gould Inc.*, 475 U.S. 282, 106 S.Ct. 1057, 89 L.Ed.2d 223 (1986), and *Boston Harbor*, 507 U.S. at 218, 113 S.Ct.

1190.[4] In *Gould*, the Court addressed a Wisconsin statute that forbade state procurement agents from using state funds to purchase products manufactured or sold by "labor law violators," i.e., employers who had violated the NLRA three times within a five-year period. 475 U.S. at 283-84, 106 S.Ct. 1057. Wisconsin conceded that it did not have the power to "bar its residents from doing business with repeat violators of the NLRA." *Id.* at 287, 106 S.Ct. 1057. It argued, however, that its statutory scheme was not unlawful because the statute merely regulated the spending power of its procurement officers. *Id.* The Court found this to be a "distinction without a difference" because the Wisconsin statute "serve[d] plainly as a means of enforcing the NLRA." *Id.* Wisconsin "concede[d], as [the Court thought] it must, that the point of [its] statute is to deter labor law violations and to reward fidelity to the law." *Id.* (internal quotation marks omitted). The Court emphasized the "rigid and undiscriminating manner in which the statute operate[d]," and concluded that "[n]o other purpose could credibly be ascribed" to the statute than creating an additional remedy for violations of the NLRA. *Id.* at 287, 106 S.Ct. 1057.

In *Boston Harbor*, on the other hand, the Court held that the Massachusetts Water Resources Authority, a state agency, acted as a market participant when it required contractors working on the cleanup of Boston Harbor to agree to the terms of a project labor agreement negotiated by a project construction manager and a labor union. 507 U.S. at 232, 113 S.Ct. 1190. The Court concluded that there was

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[4] Our discussion here is limited to the context of the market participant exception under the NLRA. A market participant exception exists in a number of other contexts, such as cases under the Commerce Clause. *See, e.g., Big Country Foods, Inc. v. Bd. of Educ. of Anchorage*, 952 F.2d 1173, 1177-79 (9th Cir.1992) (discussing market participant exception in the dormant Commerce Clause context). We do not opine on the applicability of our reasoning to the market participant exception in these other contexts.

"no question but that [the state agency] was attempting to ensure an efficient project that would be completed as quickly and effectively as possible at the lowest cost." *Id.* The Court also noted that "the challenged action in this litigation was specifically tailored to one particular job, the Boston Harbor cleanup project," and that there was no reason to believe that the government was motivated by anything other than purely proprietary interests. *Id.*

We have applied these cases in a number of contexts without formulating a general rule about when the market participant exception applies. We have held that the market participant exception did not apply to a California law that permitted employees in state-approved apprenticeship programs to receive less than the prevailing wage, but required employees in non-approved apprenticeship programs to receive the prevailing wage. *Dillingham,* 190 F.3d at 1037-38 (noting that the apprenticeship standards were not "based upon unique needs that the . . . project presented" and that the state was not motivated by "management concerns" in implementing the standards). On the other hand, we have applied the exception and held that the City of Oakland was a market participant when it canceled a newspaper subscription and refused to continue to pay for advertising during a labor dispute. *Alameda Newspapers,* 95 F.3d at 1415-16. And we have held that a city may require private contractors to adhere to the terms of a collective bargaining agreement when doing business with the city. *Associated Builders & Contractors, Inc. v. City of Seward,* 966 F.2d 492, 496 (9th Cir.1992).[5]

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[5] *City of Seward,* which was decided before *Boston Harbor*, creates some confusion about the relation of the market participant exception to other NLRA preemption doctrines. *City of Seward* concluded that "action taken by the state as a market participant is not automatically immune from NLRA preemption." 966 F.2d at 495. *Boston Harbor*, however, held explicitly that the "[NLRA] preemption doctrines apply only to state *regulation*," and that "a State may act without offending the pre-emption

These cases teach that when a state uses its spending power in a manner that is essentially not proprietary, the market participant exception will not apply and the state action may be subject to NLRA preemption. We draw upon the reasoning of the Fifth Circuit, which asks two discrete questions to determine when the market participant exception applies:

> First, does the challenged action essentially reflect the entity's own interest in its efficient procurement of needed goods and services, as measured by comparison with the typical behavior of private parties in similar circumstances? Second, does the narrow scope of the challenged action defeat an inference that its primary goal was to encourage a general policy rather than address a specific proprietary problem? Both questions seek to isolate a class of government interactions with the market that are so narrowly focused, and so in keeping with the ordinary behavior of private parties, that a regulatory impulse can be safely ruled out.

Cardinal Towing & Auto Repair, Inc. v. City of Bedford, 180 F.3d 686, 693 (5th Cir.1999).

The first question, which looks to the nature of the expenditure, protects comprehensive state policies with wide application from preemption, so long as the type of state action is essentially proprietary. *See, e.g., N. Ill. Chapter of Associated Builders & Contractors, Inc. v. Lavin,* 431 F.3d 1004, 1007 (7th Cir.2005) (state law requiring recipients of state grants for the construction of renewable-fuel plants to

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principles of the NLRA when it acts as a proprietor." 507 U.S. at 227, 229-30, 113 S.Ct. 1190. *Boston Harbor*, therefore, makes clear that once a state's action falls within the "market participant" exception, it is not preempted under the NLRA. To the extent that *City of Seward* states otherwise, we hold it overruled.

enter into a project labor agreement was not preempted, where the condition was limited to the project financed by the state grant); *Bldg. & Constr. Trades Dep't, AFL-CIO v. Allbaugh*, 295 F.3d 28, 34-36 (D.C.Cir.2002) (executive order applying to all federally funded construction projects was not pre-empted, where the order concerned a project labor agreement that private employers often enter into in the construction field). The second question, which looks at the scope of the expenditure, protects narrow spending decisions that do not necessarily reflect a state's interest in the efficient procurement of goods or services, but that also lack the effect of broader social regulation. *See, e.g., Alameda Newspapers*, 95 F.3d at 1417-18. Each question constitutes a separate method of determining whether the state action at issue actually constitutes regulation, and a state need not satisfy both questions to be deemed to act as a market participant.

Here, we conclude that sections 16645.2 and 16645.7 are regulatory and are not protected by the market participant exception. The statute on its face does not purport to reflect California's interest in the efficient procurement of goods and services, as measured by the similar behavior of private parties. Rather, the statute's preamble makes clear that the legislation's purpose is to prevent "state funds and facilities" from being used to subsidize an employer's attempt to influence employee choice about whether to join a union. *See* § 16645, Historical and Statutory Notes, Section 1 of Stats.2000, c. 872 ("It is the policy of the state not to interfere with an employee's choice about whether to join or to be represented by a labor union. For this reason, the state should not subsidize efforts by an employer to assist, promote, or deter union organizing.").

Nor do sections 16645.2 and 16645.7 have a narrow scope or other element indicating that the statute is unrelated to broader regulation. To the contrary, the statute by design sweeps broadly, applying to all employers in California who accept any state grant or program funds in excess of $10,000.

§ 16645.2, 16645.7. It requires any business that accepts state grant or program funds in excess of $10,000 to maintain records sufficient to show that these funds were not used to assist, promote or deter organizing. *Id.* It contains a provision for civil penalties and permits private parties to file civil actions against employers who violate the statute. § 16645.8. The statute's scope indicates a general state position of neutrality with regard to organizing, not a narrow attempt to achieve a specific procurement goal. These considerations counsel that sections 16645.2 and 16645.7 are regulatory measures that fall outside the market participant exception.[6]

II. NLRA Preemption

That sections 16645.2 and 16645.7 are regulatory does not mean that they are also preempted by the NLRA. "We are reluctant to infer pre-emption," *Boston Harbor,* 507 U.S. at 224, 113 S.Ct. 1190, and any analysis of preemption begins with the "basic assumption that Congress did not intend to displace state law." *Maryland v. Louisiana,* 451 U.S. 725, 746, 101 S.Ct. 2114, 68 L.Ed.2d 576 (1981). Preemption is a question of congressional intent, and the "'purpose of Congress is the ultimate touchstone' of preemption analysis." *Alameda Newspapers,* 95 F.3d at 1413 (quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 504, 98 S.Ct. 1185, 55 L.Ed.2d 443 (1978)). Although the NLRA contains

[6] This case is thus distinct from *Alameda Newspapers,* where we concluded that a city's proclamation of support in favor of a labor union in an ongoing strike at a local newspaper, and the city's decision to refrain from purchasing advertisements and to cancel its subscriptions as a result of the strike, did not constitute regulation subject to NLRA preemption. 95 F.3d at 1409. There, we emphasized the merely exhortatory nature of the proclamation, noting that "[t]he resolution ha[d] no binding force on anyone." *Id.* at 1414. We also concluded that the city's cancellation of subscriptions and refusal to advertise did not "have some 'real effect' or practical economic impact on the employer that [wa]s either different from that of the ordinary customer or . . . otherwise governmental in nature." *Id.* at 1416.

no express preemption provision, the Supreme Court has articulated two distinct NLRA preemption doctrines: *Machinists* preemption, set forth in *Lodge 76, International Ass'n of Machinists v. Wisconsin Employment Relations Commission,* 427 U.S. 132, 96 S.Ct. 2548, 49 L.Ed.2d 396 (1976), and *Garmon* preemption, set forth in *San Diego Building Trades Council v. Garmon,* 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959). We hold that sections 16645.2 and 16645.7 are not preempted under either *Machinists* or *Garmon.*

A. Machinists *Preemption*

Machinists preemption operates as a form of labor field preemption. It requires the preemption of any state regulation of activity that, although not directly regulated by the NLRA, was intended by Congress "to be controlled by the free play of economic forces," *Machinists,* 427 U.S. at 140, 96 S.Ct. 2548 (internal quotation marks and citation omitted), in a "zone free from all regulations, whether state or federal." *Boston Harbor,* 507 U.S. at 226, 113 S.Ct. 1190. The doctrine "is based on the premise that 'the use of economic pressure by the parties to a labor dispute is . . . part and parcel of the process of collective bargaining,' " which means that "neither a state nor the National Labor Relations Board is 'afforded flexibility in picking and choosing which economic devices of labor and management shall be branded unlawful.' " *Alameda Newspapers,* 95 F.3d at 1413 (quoting *Machinists,* 427 U.S. at 144, 149, 96 S.Ct. 2548). "*Machinists* pre-emption preserves Congress' intentional balance between the uncontrolled power of management and labor to further their respective interests" in an area free from regulation. *Boston Harbor,* 507 U.S. at 226, 113 S.Ct. 1190 (internal quotation marks and citation omitted).

Federal courts of appeals have applied *Machinists* pre-emption in the context of collective bargaining between organized labor and employers, not in the context of

organizing, which is the subject of AB 1889.[7] *Machinists* itself dealt with a collective bargaining dispute in which union members refused to accept overtime assignments during labor contract renewal negotiations. The Supreme Court held that "state attempts to influence the substantive terms of collective-bargaining agreements are as inconsistent with the federal regulatory scheme as are such attempts by the NLRB," and that "federal labor policy and the federal Act have pre-empted state regulatory authority to police the use by employees and employers of peaceful methods of putting economic pressure upon one another." 427 U.S. at 153, 154, 96 S.Ct. 2548. In *Golden State Transit Corp. v. City of Los Angeles,* 493 U.S. 103, 110-11, 110 S.Ct. 444, 107 L.Ed.2d 420 (1989), the Court stated that "[i]n *Machinists,* we reiterated that Congress intended to give parties to a collective-bargaining agreement the right to make use of 'economic weapons,' not explicitly set forth in the Act, free of governmental interference."[8] And in *Metropolitan Life Insurance Co. v. Massachusetts,* where a state statute mandating minimum healthcare benefits was held not to be preempted, the Court explained:

> [*Machinists*] cases rely on the understanding that in organization and collective bargaining, Congress

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[7] The dissent contends that *Machinists* preempts AB 1889 because the California statute "specifically targets and substantially affects the NLRA *bargaining process.*" (Dissent at 1106 (emphasis added).) But AB 1889 applies only to organizing, not collective bargaining.

[8] In the Court's 1989 *Golden State Transit Corp.* decision, it held that the taxi company was entitled to maintain a § 1983 action against Los Angeles for the city's violation of the company's right (as stated in the Court's 1986 decision, *Golden State Transit Corp. v. City of Los Angeles,* 475 U.S. 608, 106 S.Ct. 1395, 89 L.Ed.2d 616 (1986) ("*Golden State I*")), to be free from interference with its choice and use of economic weapons in the collective bargaining process. In *Golden State I,* the Court had held that the city's refusal to renew the taxi company's franchise because the company's employees were on strike was preempted under *Machinists.*

> determined both how much the conduct of unions and employers should be regulated, and how much it should be left unregulated: The States have no more authority than the Board to upset the balance that Congress has struck between labor and management in the collective-bargaining relationship. For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal Act prohibits. All parties correctly understand this case to involve *Machinists* pre-emption.

471 U.S. 724, 751, 105 S.Ct. 2380, 85 L.Ed.2d 728 (1985) (internal quotation marks and citation omitted).

We have also held that " *Machinists* preemption prohibits states from imposing restrictions on labor and management's 'weapon[s] of self-help' that were left unregulated in the NLRA because Congress intended for tactical bargaining decisions and conduct 'to be controlled by the free play of economic forces.' " *Associated Builders & Contractors of S. Cal. v. Nunn*, 356 F.3d 979, 987 (9th Cir.2004) (alteration in original) (quoting *Machinists*, 427 U.S. at 140, 146, 96 S.Ct. 2548); *see also St. Thomas-St. John Hotel & Tourism Ass'n., Inc. v. Gov't of U.S.V.I. ex rel. V.I. Dep't of Labor*, 357 F.3d 297, 302 n. 4 (3d Cir.2004) ("Machinists preemption is a form of conflict pre-emption under which state regulation of the bargaining conduct of private parties is displaced because it conflicts with the purpose of Congress in enacting the NLRA to leave that conduct to be controlled by the free play of economic forces." (internal quotation marks and citation omitted)); *McNealy v. Caterpillar, Inc.*, 139 F.3d 1113, 1117 n. 1 (7th Cir.1998) ("The Machinists doctrine similarly preempts state regulation of the economic weapons that Congress intended to leave available to unions and employers."); *Glenwood Bridge, Inc. v. City of Minneapolis*, 940 F.2d 367, 370-71 (8th Cir.1991) (invoking *Machinists* preemption in a "state's intrusion into the bargaining process" between organized labor and an employer); *Derrico*

v. Sheehan Emergency Hosp., 844 F.2d 22, 29 (2d Cir.1988) ("Our analysis of the [*Machinists*] pre-emption issues similarly accords with the principle that the parties' intent must govern the duration of their collectively bargained agreements."). Insofar as all these cases concern collective bargaining, they suggest that *Machinists'* principal and native application is limited to that sphere of activity, where Congress enacted an "intentional balance between the uncontrolled power of management" and organized labor to advance their respective interests in negotiating the terms and conditions of employment. *Boston Harbor,* 507 U.S. at 226, 113 S.Ct. 1190 (internal quotation marks and citation omitted). Correspondingly, these cases strongly suggest that the *Machinists* doctrine is not likely to apply to organizing, a conclusion that the Chamber of Commerce conceded during oral argument when it acknowledged that interference with organizing is "typically" analyzed under the *Garmon* doctrine.[9]

We need not resolve whether *Machinists* extends to pre-empting a state action that potentially affects organizing, because even if it did, AB 1889 would not be preempted under the *Machinists* doctrine. In enacting a restriction on the use of state grant and program funds with the purpose of remaining neutral in labor disputes, California has not intruded on conduct meant to be left to the free play of economic forces, an area free from all governmental regulation. Indeed, it is implausible that Congress intended the use of such funds to be an area "unregulated because left

[9] Secondary sources also discuss *Machinists* in the context of collective bargaining, not organizing. *See, e.g.*, N. Peter Lareau, 2 *Labor and Employment Law* 36.11-36.17 (2005); Robert A. Gorman, *Labor Law* 1103-10 (2004); Patrick Hardin et al., 2 *The Developing Labor Law* 2192-99 (2002); Robert Rachal, Machinists *Preemption Under the NLRA: A Powerful Tool to Protect an Employer's Freedom to Bargain,* 58 La. L.Rev. 1065, 1065 (1998) ("To protect the collective bargaining process from [attempts by government to alter collective bargaining], the Supreme Court developed *Machinists* preemption.").

to be controlled by the free play of economic forces," *Machinists*, 427 U.S. at 140, 96 S.Ct. 2548 (internal quotation marks omitted), when the state's choices of how to spend its funds are by definition not controlled by the free play of economic forces. *See Boston Harbor*, 507 U.S. at 225-26, 113 S.Ct. 1190.

In any event, AB 1889's restrictions on the use of grant and program funds do not interfere with an employer's ability to engage in "self-help" in the sense protected by *Machinists*. Unlike in *Gould* and *Golden State I*, the state has not engaged in a naked attempt to use its spending power to "introduce some standard of properly balanced bargaining power" or to alter employers' private spending decisions. *Machinists*, 427 U.S. at 149-50, 96 S.Ct. 2548 (internal quotation marks and citation omitted). In restricting the *use* of state funds, California has not made employer neutrality or the substantive terms of employment between employer and employee a condition for the *receipt* of state funds. Under AB 1889, an employer has and retains the freedom to spend its own funds however it wishes; it simply may not spend state grant and program funds on its union-related advocacy. In contrast, had California enacted a statute that required neutrality as a condition of receiving state funds, the employer's use of its own funds would thereby have been curtailed. *See infra* pp. 1096-98.

The National Labor Relations Board ("NLRB"), which filed an *amicus curiae* brief in support of the Chamber of Commerce, nonetheless urges that *Machinists* does preempt the California statute. It cites *Alto Plastics Manufacturing Corp.*, 136 N.L.R.B. 850, 851 (1962), for the proposition that in a representation election, "employees may select a 'good' labor organization, a 'bad' labor organization, or no labor organization, it being presupposed that employees will intelligently exercise their right to select their bargaining representative." The NLRB contends that AB 1889 works at cross purposes with such a policy because it limits the flow of information to employees by regulating employer speech

in an area-an organization election-that Congress *did* intend to be controlled by the free play of economic forces.

We disagree with the way in which the NLRB characterizes AB 1889 and invokes *Machinists*. As explained above, the California statute does not prevent an employer from using non-state funds to assist, promote or deter organizing; it only restricts a recipient's use of state grant and program funds (in excess of $10,000) for that purpose. Consequently, the California statute does not impede the flow of information to employees by regulating employers' speech. Employers remain free to convey their views regarding unionization, and thus to exercise their First Amendment rights, provided only that they do not use state grant and program funds to do so.[10] For example, even if an employer made a business decision to fund its operations entirely through the receipt of state grants, such that the statute effectively prevented that employer from spending any portion of its revenues to advocate during an organization election, that effect would be incidental and solely the consequence of the employer's free-market choice. Nothing prevents the employer from raising additional funds from a non-state source and using those funds for advocacy purposes. It is well established that a legislature may attach "reasonable and unambiguous" conditions to funds that a recipient is not obligated to accept. *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, ___ U.S. ___, 126 S.Ct. 1297, 1306, 164 L.Ed.2d 156 (2006) (internal quotation marks omitted); *see also Lavin*, 431 F.3d at 1006 (citing *Rust*, 500 U.S. at 173, 111 S.Ct. 1759; *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 118 S.Ct. 2168, 141

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[10] The statute's effect is therefore [illegible] and incidental, not unlike the Massachusetts law upheld in *M[illegible]ife*. *See* 471 U.S. at 755, 105 S.Ct. 2380 ("Minimum state labor standards . . . neither encourage nor discourage the collective-bargaining processes that are the subject of the NLRA. Nor do they have any but the most indirect effect on the right of self-organization established in the Act.").

L.Ed.2d 500 (1998); *Buckley v. Valeo,* 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976)). We "cannot declare pre-empted all local regulation that touches or concerns in any way the complex interrelationships between employees, employers, and unions; obviously, much of this is left to the States." *Metro. Life,* 471 U.S. at 757, 105 S.Ct. 2380 (internal quotation marks omitted).

More fundamentally, the NLRB is simply incorrect to suggest that *Machinists* preempts the California statute. As the NLRB acknowledges elsewhere in its brief, *Machinists* applies *solely* to zones of activity left free from *all* regulation. *See Boston Harbor,* 507 U.S. at 226, 113 S.Ct. 1190. The NLRB's own extensive regulation of organizing activities demonstrates that *organizing*-and employer speech in the context of organizing-is not such a zone. *See, e.g., Peoria Plastic Co.,* 117 N.L.R.B. 545, 547-48 (1957) (NLRB barring interviews with employees in their homes immediately before an election); *Peerless Plywood Co.,* 107 N.L.R.B. 427, 429 (1953) (NLRB barring employers and unions alike from making election speeches on company time to massed assemblies of employees within 24 hours of an election). *See also NLRB v. A.J. Tower Co.,* 329 U.S. 324, 330, 67 S.Ct. 324, 91 L.Ed. 322 (1946) ("Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees.").[11] Indeed, section 9 of the NLRA affirmatively grants the NLRB power to regulate employer and union

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[11] Like the NLRB, the dissent undermines its own argument when it cites Board decisions as examples of the NLRB's regulation of the organizing process. (Dissent at 1105.) *Machinists* applies only to zones free from all regulation, and the NLRB decisions show that organizing is not such a zone. "A state law that both explicitly targets and directly regulates processes controlled by the NLRA" might be preempted under *Garmon, see infra* p. 1090, but is surely not preempted "under the *Machinists* doctrine." (Dissent at 1105.)

conduct, including speech, that is prejudicial to a fair election. 29 U.S.C. § 159. In *Linn v. United Plant Guard Workers of Am., Local 114*, 383 U.S. 53, 60, 86 S.Ct. 657, 15 L.Ed.2d 582 (1966), the Supreme Court observed that the NLRB can set aside an election where a material fact has been misrepresented in the representation campaign, opportunity for a reply was lacking and the misrepresentation had an effect on the free choice of voting employees. The Court likewise noted that in a number of cases, the NLRB had even determined that use of "epithets such as 'scab,' 'unfair,' and 'liar,' " though not so indefensible as to remove them from the protection of section 7, could lead the NLRB to set aside an election if such epithets had "been uttered with actual malice, a deliberate intention to falsify or a malevolent desire to injure." *Id.* at 60-61, 86 S.Ct. 657 (citing *Bettcher Mfg. Corp.*, 76 N.L.R.B. 526 (1948); *Atl. Towing Co.*, 75 N.L.R.B. 1169, 1170-73 (1948) (internal quotation marks omitted)). *See also Midland Nat'l Life Ins. Co.*, 263 N.L.R.B. 127, 133 (1982) ("[W]e will set an election aside not because of the substance of the representation, but because of the deceptive manner in which it was made. . . .").

Significantly, the spending restrictions challenged by the Chamber of Commerce and NLRB are modeled precisely on those that Congress has enacted when prohibiting the use of federal funds to assist, promote or deter organizing. *See, e.g.*, Workforce Investment Act, 29 U.S.C. § 2931(b)(7) ("Each recipient of funds . . . shall provide to the Secretary assurances that none of such funds will be used to assist, promote, or deter union organizing."); National and Community Service State Grant Program, 42 U.S.C. § 12634(b)(1) ("Assistance provided under this title shall not be used by program participants and program staff to . . . assist, promote, or deter union organizing."); Head Start Programs Act, 42 U.S.C. § 9839(e) ("Funds appropriated to carry out this sub-chapter shall not be used to assist, promote, or deter union organizing."); *see also* Medicare

Act, 42 U.S.C. § 1395x(v)(1)(N) ("In determining such reasonable costs, costs incurred for activities directly related to influencing employees respecting unionization may not be included."). These restrictions are inconsistent with a congressional belief that union organizing involves "conduct intended to be unregulated." *Golden State Transit Corp.*, 475 U.S. at 614, 106 S.Ct. 1395 (internal quotation marks omitted). Instead, because an area left to the free play of economic forces is a "zone free from *all* regulations, *whether state or federal*," *Boston Harbor*, 507 U.S. at 226, 113 S.Ct. 1190 (emphasis added), the federal restrictions are compelling evidence that the analogous conditions in AB 1889 do not intrude in a regulation-free area of labor relations and thus, contrary to the dissent's suggestion, do not "operate to frustrate the purpose" of the NLRA. (Dissent at 11821, quoting *Local 20, Teamsters v. Morton*, 377 U.S. 252, 258, 84 S.Ct. 1253, 12 L.Ed.2d 280 (1964).) "The fact that Congress itself has . . . imposed the same type of restriction . . . as [a state] seeks to impose . . . is surely evidence that Congress does not view such a restriction as incompatible with its labor policies." *De Veau v. Braisted*, 363 U.S. 144, 156, 80 S.Ct. 1146, 4 L.Ed.2d 1109 (1960) (plurality opinion).[12]

In sum, the mechanism California has employed to preserve its neutrality in labor disputes does not affect an employer's ability to use its own funds in connection with

[12] The Supreme Court engaged in similar reasoning in *Metropolitan Life*, 471 U.S. at 754-55, 105 S.Ct. 2380. There, the Court held that no incompatibility existed between national labor policy expressed in federal rules designed to restore the equality of bargaining power and state legislation that imposed minimal substantive requirements (in the form of healthcare benefits) on contract terms negotiated between parties to labor agreements. The Court reached this conclusion by noting, among other things, that it made no sense to infer that Congress intended the NLRA to deprive states of the ability to take such action when Congress itself passed similar federal laws applying to unionized employers and employees.

union organizing activities; nor do such activities constitute an area Congress intended to be free from all regulation. Accordingly, AB 1889 is not preempted under *Machinists*.

B. Garmon *Preemption*

Garmon preemption arises when there is an actual or potential conflict between state regulation and federal labor law due to state regulation of activity that is actually or arguably protected or prohibited by the NLRA. "When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield." *Garmon*, 359 U.S. at 244, 79 S.Ct. 773. Nonetheless,

> [w]hile the *Garmon* formulation accurately reflects the basic federal concern with potential state interference with national labor policy, the history of the labor pre-emption doctrine ··· does not support an approach which sweeps away state-court jurisdiction over conduct traditionally subject to state regulation without careful consideration of the relative impact of such a jurisdictional bar on the various interests affected.

Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 436 U.S. 180, 188, 98 S.Ct. 1745, 56 L.Ed.2d 209 (1978).

1. *Actually protected or prohibited*

Section 7 of the NLRA is entitled "Right of employees as to organization, collective bargaining, etc." 29 U.S.C. § 157. It identifies areas of protected employee conduct and can be fairly characterized as setting forth those employee practices that are actually protected by the NLRA. Section 8, conversely, is entitled "Unfair labor practices." 29 U.S.C. § 158. By its plain terms, it sets forth activities that are actually prohibited by the NLRA. It is easy to see how both section 7 and section 8 can be implicated in a *Garmon* preemption analysis: if a state regulates employee activities

that are actually protected under section 7, or activities of either employers or labor unions that are actually prohibited under section 8, that regulation will be preempted unless it falls within an exception to *Garmon*. *See* 359 U.S. at 243-44, 79 S.Ct. 773.

Section 8(c) prohibits sanctioning employers under the NLRA for engaging in an unfair labor practice when they exercise speech rights that are guaranteed by the First Amendment.[13] This subsection can be termed the "free speech exemption" to section 8's delineation of unfair labor practices, because it carves out noncoercive speech from the category of actually punishable activity. Notwithstanding the dissent's mistaken insistence to the contrary, section 8(c) does not *grant* employers speech rights. (Dissent at 1107.) Rather, it simply prohibits their noncoercive speech from being used as evidence of an unfair labor practice. *See, e.g., NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617, 89 S.Ct. 1918, 23 L.Ed.2d 547 (1969) (stating that section 8(c) "merely implements the First Amendment"); *Hotel Employees, Local 2 v. Marriott Corp.*, 961 F.2d 1464, 1470 n. 9 (9th Cir.1992) ("[S]ection 8(c) merely states an employer does not commit an unfair labor practice by expressing its views regarding unionization."); *UAW-Labor Employment & Training Corp. v. Chao*, 325 F.3d 360, 364-65 (D.C.Cir.2003) ("Fitting a *Garmon* claim under the language of § 8(c) is awkward . . . . [T]he activities described in § 8(c) . . . are not 'protected *by*' the NLRA, except from the NLRA itself."); *see also Fiber Indus., Inc.*, 267 N.L.R.B.

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[13] Entitled "Expression of views without threat of reprisal or force or promise of benefit," § 8(c) provides that "[t]he expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit." 29 U.S.C. § 158(c).

840, 841 (1983) ("[I]t is well settled that Sec. 8(c) applies only to unfair labor practice proceedings.").

The Chamber of Commerce and dissent argue, however, that to say an activity is not punishable by the NLRA is to protect that activity. Because AB 1889's restrictions on grant and program funds purportedly affect an employer's ability to speak against unionization, the Chamber of Commerce and dissent urge, the statute improperly intrudes on the employer's implied (yet somehow actually explicit in section 8(c)) NLRA speech right-as distinct from its separate First Amendment rights-and is therefore preempted under *Garmon*.

We reject this peculiar proposition. The Chamber of Commerce and dissent cite no authority to support it, and the NLRB itself makes no such claim as to section 8(c)'s supposed affirmative grant of speech rights. *See NLRB Amicus Brief* at 4, 21-26 (echoing interpretation of NLRA in cases quoted above, and noting section 8(c)'s "exemption" for non-coercive speech). Rather, some activities in labor relations are neither protected nor prohibited by the NLRA and are therefore not preempted under *Garmon*. *See, e.g., NLRB v. Ins. Agents' Int'l Union*, 361 U.S. 477, 492-95 & n. 23, 80 S.Ct. 419, 4 L.Ed.2d 454 (1960) (finding unpersuasive the argument that because certain union activities were unprotected under section 7, those activities should also be deemed unfair labor practices under section 8, and stating that "[t]here is little logic in assuming that because Congress was willing to allow employers to use self-help against union tactics, if they were willing to face the economic consequences of its use, it also impliedly declared these tactics unlawful as a matter of federal law").[14] If this were

[14] *See also UAW-Labor Employment & Training Corp.*, 325 F.3d at 363-64 ("The dissent makes a similar error when it suggests that the order is preempted because it conflicts with the 'regulatory scheme' the Board has established. This would be a sound analysis under 'field' preemption, but *Garmon* works differently, operating only as to activities arguably

not the case, *Machinists* preemption would cease to exist, for *Machinists* addresses "activity that [i]s neither arguably protected against employer interference by § 7 and 8(a)(1) of the NLRA, nor arguably prohibited as an unfair labor practice by § 8(b) of that Act." *Metropolitan Life,* 471 U.S. at 749, 105 S.Ct. 2380.

California's refusal to subsidize employer speech for or against unionization does not regulate an activity that is actually protected or actually prohibited by the NLRA. It does not interfere with, much less govern, "the same partisan employer speech that Congress committed to the jurisdiction of the NLRB." (Dissent at 1107.) Nor does it infringe employers' First Amendment rights, because employers remain free to use their own funds to advocate for or against unionization and are not required to accept neutrality as a condition for receipt of state grant and program funds. *See infra* pp. 1095-1097; *see also Regan v. Taxation with Representation,* 461 U.S. 540, 549, 103 S.Ct. 1997, 76 L.Ed.2d 129 (1983) ("We have held in several contexts that a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right."); *Rust,* 500 U.S. at 193, 200, 111 S.Ct. 1759; *Cammarano v. United States,* 358 U.S. 498, 513, 79 S.Ct. 524, 3 L.Ed.2d 462 (1959).

2. *Arguably protected or prohibited*

In *Sears,* the Supreme Court refined its *Garmon* preemption doctrine in the context of an employer's common law trespass suit against picketing union members where the picketing was "arguably-but not definitely-prohibited or protected by federal law." 436 U.S. at 182, 98 S.Ct. 1745. *Sears* divided the inquiry into two related but distinct

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protected or prohibited, *not* to ones simply left alone, even if left alone deliberately." (internal citations omitted)).

questions: whether the state court's jurisdiction over the trespassing claim was pre-empted (1) by the arguably prohibited nature of the picketing, or (2) by its arguably protected nature.[15]

As to whether the union's picketing was arguably prohibited by the NLRA, *Sears* articulated a relatively straightforward "primary jurisdiction" test: if the claim considered by the state tribunal is identical to one that could be presented to the NLRB, the state's jurisdiction is preempted. *Id.* at 197, 201, 98 S.Ct. 1745; *see also Belknap, Inc. v. Hale,* 463 U.S. 491, 511-12, 103 S.Ct. 3172, 77 L.Ed.2d 798 (1983) (applying primary jurisdiction test to state regulation of arguably prohibited conduct). As to whether the picketing was arguably protected by the NLRA, the Court went beyond the primary jurisdiction test to address additional federal supremacy concerns: chiefly,

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[15] The dissent argues that we err in considering whether AB 1889 is pre-empted by interfering unduly with an arguably protected or prohibited activity because, in the dissent's idiosyncratic and incorrect view, the real cause of *Garmon* preemption is AB 1889's alleged interference with actually protected conduct-the speech rights purportedly granted under § 8(c). (Dissent at 1109.) Insofar as the dissent suggests we apply *Sears* to avoid addressing whether AB 1889 is preempted by interfering with an actually protected activity (Dissent at 1108), its claim ignores our express repudiation of that argument in Section II.B.1 *supra.* To the extent the dissent contends we err in even analyzing whether AB 1889 interferes with arguably protected or prohibited conduct (*id.* at 1108, 1109), it neglects the Chamber of Commerce's own contention that the statute does so, and fails to recognize that such analysis is orthodox in *Garmon* analysis. *See, e.g., Local 926, Int'l Union of Operating Eng'rs v. Jones,* 460 U.S. 669, 676, 103 S.Ct. 1453, 75 L.Ed.2d 368 (1983) ("Our approach to the pre-emption issue has thus been stated and restated. First, we determine whether the conduct that the State seeks to regulate or to make the basis of liability is actually *or arguably* protected or prohibited by the NLRA. Although the *Garmon* guidelines [are not to be applied] in a literal, mechanical fashion, if the conduct at issue is *arguably* prohibited or protected otherwise applicable state law and procedures are ordinarily pre-empted." (internal quotation marks and citations omitted) (alteration in original) (emphasis added)).

whether preemption was warranted-despite the lack of identity between issues the state court and NLRB might consider-to protect against the "risk of misinterpretation of [the NLRA] and the consequent prohibition of protected conduct." *Sears*, 436 U.S. at 203, 98 S.Ct. 1745. We employed this "primary jurisdiction plus" approach in *Radcliffe v. Rainbow Construction Co.*, 254 F.3d 772, 786 (9th Cir.2001), where we held that state jurisdiction over claims by union members against an employer for false arrest, false imprisonment and malicious prosecution were not preempted under *Garmon*.[16]

Here, the parties do not dispute that the NLRB has no interest in resolving the central controversy that a state court would have to resolve in enforcing AB 1889, namely, whether state funds were used to "assist, promote, or deter union organizing." Far from being the same as a question the NLRB might consider, a suit under the California statute would entail accounting only for the employer's possible use of state funds.

The Chamber of Commerce, however, argues that a state court enforcing AB 1889 would in some instances need to determine whether a union was a "labor organization" under section 16647, an area that it claims is reserved to the NLRB under *Marine Engineers Beneficial Ass'n v. Interlake S.S. Co.*, 370 U.S. 173, 178, 82 S.Ct. 1237, 8 L.Ed.2d 418 (1962). But even if the state court had to make such a determination, it would be relevant only to the ultimate question of whether an employer spent state grant or program funds to assist, promote or deter organizing, not to whether the employer's advocacy violated the NLRA. We have previously rejected an argument that the incidental determination by a state court of whether persons were engaged "in lawful union activity"

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[16] In *Radcliffe*, defendants argued that "the validity of the plaintiffs' claims ··· turns on whether the union activities carried on by the plaintiffs were ··· protected by § 7 of the NLRA." 254 F.3d at 785.

was sufficient to occasion *Garmon* pre-emption, where the focus of the state proceeding was on "state concerns of accommodating such union activity with the state-law rights of private property." *Radcliffe*, 254 F.3d at 786. Moreover, AB 1889 is not comparable to the Minnesota statute at issue in *Marine Engineers*, under which a state law determination that certain groups were not labor organizations permitted the state court to regulate picketing and other activities identical to those that could have been raised before the NLRB. *Marine Eng'rs*, 370 U.S. at 176, 82 S.Ct. 1237.

The Chamber of Commerce also argues that because AB 1889 restricts an employer's ability to use state funds to "influence" its employees, *see* § 16645(a), California courts would effectively be deciding whether employers had improperly acted under section 8(a) of the NLRA to "restrain [ ] or coerce employees in the exercise of the rights guaranteed in [section 7 of the NLRA]." 29 U.S.C. § 158(a)(1) (NLRA § 8(a)). However, were the NLRB to consider an unfair labor practice charge arising from the employer's conduct, it would focus on whether the employer had interfered with the employees' section 7 rights, regardless of whether the employer used state funds in the process. In contrast, under AB 1889, the California court would determine only whether an employer used state grant or program funds to influence employees, not whether that attempt violated the NLRA. Because the statute focuses solely on the *use* of state funds, there is no identity of claims, and the primary jurisdiction test is not met.[17]

We next assess whether the state statute is preempted because Congress would "prefer[ ] the costs inherent in a jurisdictional hiatus to the frustration of national labor policy

[17] There is no merit to the Chamber of Commerce's claim that the California statute provides an additional remedy for NLRA violations. The statute's damages provisions are intended to remedy the misuse of state funds under the statute, regardless of whether any NLRA violation has occurred.

which might accompany the exercise of state jurisdiction." *Sears*, 436 U.S. at 203, 98 S.Ct. 1745. For essentially the same reasons explained in the primary jurisdiction analysis, there is no risk that a state court applying AB 1889 could "misinterpret[] . . . federal law." *Id.* Not only is there no identity of claims, but the subject matter of an AB 1889 suit is so far removed from the NLRA's primary focus-the determination of what constitutes an unfair labor practice-that any rationale for *Garmon* preemption is absent.

Sears itself is instructive. In that case, after noting the state interest in hearing trespass claims, the Court identified a clear potential overlap between the NLRB's jurisdiction and that of the state court.

> [T]he state court was obligated to decide[whether] the trespass was not actually protected by federal law, a determination which might entail an accommodation of Sears' property rights and the Union's § 7 rights. In an unfair labor practice proceeding initiated by the Union, the Board might have been required to make the same accommodation.

Id. at 201, 98 S.Ct. 1745. The Court further stated that the trespass at issue was arguably protected by the NLRA, whereas previously recognized exceptions to *Garmon* preemption did not "involve[ ] protected conduct." *Id.* at 204, 98 S.Ct. 1745. Nevertheless, the Court held that the risk that a state's regulation of trespass might impermissibly trench upon the NLRB's jurisdiction over the speech rights of union members was too unlikely to justify usurpation of the state's prerogative. There was no "significant risk of prohibition of protected conduct," so the Court was "unwilling to presume that Congress intended the arguably protected character of the [regulated] conduct to deprive the California courts of jurisdiction to entertain Sears' trespass action." *Id.* at 207, 98 S.Ct. 1745.

In contrast to *Sears*, there is no potential overlap between the NLRB's jurisdiction and that of a state court hearing a

suit brought under AB 1889. However, even if there were some risk of overlap, California has as important and legitimate a sovereign interest in determining how the recipients of state grant and program funds use those funds as it does in entertaining trespass actions. Thus, even if AB 1889 had some peripheral and incidental effect on the arguably protected advocacy rights of employers, given the nature and mechanics of the statute (which has no concern for whether the speech at issue is protected by the NLRA, but focuses only on the source of the money funding the speech), there is no "significant risk of prohibition of protected conduct." *Id.* California's interest is so strong that we cannot presume that Congress intended the arguably protected character of the [regulated] conduct to deprive" the state of the ability to control the use of its fisc in this modest manner. *Id.*

The Supreme Court has cautioned that "inflexible application of [the *Garmon*] doctrine is to be avoided, especially where the State has a substantial interest in regulation of the conduct at issue and the State's interest is one that does not threaten undue interference with the federal regulatory scheme." *Farmer v. United Bhd. of Carpenters,* 430 U.S. 290, 302, 97 S.Ct. 1056, 51 L.Ed.2d 338 (1977). Our "balanced inquiry into such factors as the nature of the federal and state interests in regulation and the potential for interference with federal regulation," *Id.* at 300, 97 S.Ct. 1056, ensures that we avoid preempting state regulation of conduct that involves "interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we [cannot] infer that Congress ha[s] deprived the States of the power to act," or where "the activity regulated [is] a merely peripheral concern" of the NLRA. *Garmon,* 359 U.S. at 243-44, 79 S.Ct. 773; *see also Belknap,* 463 U.S. at 498, 103 S.Ct. 3172. The previously recognized exceptions to *Garmon* preemption have involved exercises of state court jurisdiction over universally recognized common law torts, rather than, as here, the

limited exercise of a state's spending power. *See, e.g., Linn,* 383 U.S. at 62, 86 S.Ct. 657 ("[A] State's concern with redressing malicious libel is 'so deeply rooted in local feeling and responsibility'" that it is not preempted despite arguably overlapping NLRB jurisdiction over the speech at issue.) (quoting *Garmon,* 359 U.S. at 244, 79 S.Ct. 773). But the logic that compelled the Supreme Court to recognize the exception for certain torts applies just as powerfully, if not more so, to a state's effort to ensure that those who accept its grant and program funds use them for the purpose for which they were given.[18]

In this sense, a state's control of its purse strings is of at least as great a concern to the state as its power to regulate defamatory speech, violence, trespass, obstruction of access to property or the intentional infliction of emotional distress.[19] Just as the state has a responsibility to protect its citizenry from such torts, so it has a responsibility and a right to spend its treasure-largely generated from the pockets of its citizens-based on principles and guidelines that its democratically elected legislature deems to be appropriate. Such spending decisions are, of course, subject to federal supremacy concerns. But the Supreme Court has commanded us to be extremely cautious before concluding that a federal regulatory scheme intrudes upon so fundamental a state prerogative. "Whatever risk of an

[18] For instance, suppose California granted money to hospitals to create more nurse positions and did not want the effectiveness of its grants diminished by funding a campaign to convince nurses not to unionize. So long as the hospitals remained free to lobby nurses with their own monies, California would be well within its rights to insist that its grants be used for the purpose for which they were given-the creation of needed nursing positions.

[19] *See Linn,* 383 U.S. at 63-64, 86 S.Ct. 657; *Youngdahl v. Rainfair, Inc.,* 355 U.S. 131, 139-40, 78 S.Ct. 206, 2 L.Ed.2d 151 (1957); *Sears,* 436 U.S. at 207, 98 S.Ct. 1745; *Int'l Union, United Auto. Workers of America (UAW-CIO) v. Russell,* 356 U.S. 634, 644-46, 78 S.Ct. 932, 2 L.Ed.2d 1030 (1958); *Farmer,* 430 U.S. at 302-06, 97 S.Ct. 1056.

erroneous state-court adjudication does exist is outweighed by the anomalous consequence of a rule" that would deny the state the ability to control its fisc in the circumstances presented here. *Sears,* 436 U.S. at 206, 98 S.Ct. 1745. In an era of tight budgets, where many important and competing interests vie for every dollar of a state's treasury, it is all the more important that states retain their right to control the allocation of their scarce resources. Thus, even if AB 1889's restriction on the use of state grant and program funds intruded on an activity arguably protected or arguably prohibited by the NLRA-and we hold that it does not-*Garmon's* recognized exception would save the California statute from preemption. *See Garmon,* 359 U.S. at 243-44, 79 S.Ct. 773.

III. First Amendment

Although we elsewhere discuss why AB 1889 does not infringe the First Amendment rights of grant and program fund recipients, *see supra* pp. 1087-1089, 1092, we elaborate on our reasoning here in response to the dissent's contention to the contrary based largely on its erroneous premise that AB 1889 compels "employers themselves to take a position of neutrality with respect to labor relations." (Dissent at 1099.) As we explained in Section II.A., *supra* p. 1087, the California statute does not impose any condition on the *receipt* of state grant and program funds. Because an employer retains the freedom to raise and spend its own funds however it wishes-so long as it does not *use* state grant and program funds on union-related advocacy-AB 1889 does not infringe employers' First Amendment right to express whatever view they wish on organizing.[20]

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[20] For instance, California agreed during oral argument that nothing in AB 1889 prevents a closed corporation that receives 100% of its revenues from the state from using its *own* funds to assist, promote or deter organizing, where the corporation receives those funds as a capital contribution by a shareholder who reinvested a legitimately distributed

Accordingly, AB 1889's effect on speech is properly considered in light of *Rust v. Sullivan*, 500 U.S. 173, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991). In *Rust*, the Court held that "[b]y requiring that the . . . grantee engage in abortion-related activity separately from activity receiving federal funding, Congress has . . . not denied it the right to engage in abortion-related activities." *Id.* at 198, 111 S.Ct. 1759. In short, a restriction on the use of government funds for an activity does not compel cessation of the activity.

Here, California has not "denied" employers the "right to engage in [union]-related activity," but has "merely refused to fund such activities out of the public fisc." *Id.* This conclusion follows from the Court's familiar observation about what is regulation and what is not. "[A] legislature's decision not to subsidize the exercise of a . . . right does not infringe the right." *Regan*, 461 U.S. at 546, 549, 103 S.Ct. 1997 (rejecting the "notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State"); *see also Lyng v. Int'l Union, UAW*, 485 U.S. 360, 368-69, 108 S.Ct. 1184, 99 L.Ed.2d 380 (1988). The legislature can "insist [ ] that public funds be spent for the purposes for which they [a]re authorized," even if doing so forbids the use of government funds for other speech. *Rust*, 500 U.S. at 196, 111 S.Ct. 1759; *see also United States v. Am. Library Ass'n*, 539 U.S. 194, 212, 123 S.Ct. 2297, 156 L.Ed.2d 221 (2003). California, in enacting AB 1889, has simply availed itself of that prerogative.[21]

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corporate dividend-itself the fruit of the receipt of state grant or program funds.

[21] The dissent questions the legitimacy of AB 1889 because the statute was "sponsored by the California Labor Federation, AFL-CIO, and supported by a phalanx of labor unions." (Dissent at 1102.) Not only is this an irrelevant consideration, but it also is not up to us as judges to

Nor is there any merit to the dissent's assertion that AB 1889 violates employers' First Amendment Rights by "irrevocably stamp[ing] dollar bills with 'Property of California' " and "limit[ing] the items an employer may purchase with these specific dollar bills." (Dissent at 1099.) The dissent's parade of horribles goes far beyond the scope of plaintiffs' facial challenge to sections 16645.2 and 16645.7 and the record before us. The district court made no findings, nor is there evidence, that AB 1889 "co-opts the payment for goods and services and profit realized under a contract." (Dissent at 1098.)[22] Consistent with *Rust,* the California statute, like various federal acts, requires only that those who accept government grant and program funds use them for the purpose for which they were given. Our construction of AB 1889 is "readily apparent," *Gooding v. Wilson,* 405 U.S. 518, 521, 92 S.Ct. 1103, 31 L.Ed.2d 408

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impugn the California legislature's motives. As the Seventh Circuit wisely observed in *Lavin*

> If (as seems likely) Illinois has taken the approach in this law because state officials want to assist organized labor as well as the farmers who supply the grain to be made into ethanol and the owners of ethanol plants, that is neither a surprise nor a reason for invalidity. Most legislation is the product of coalitions among interest groups. Boston wanted to clean up its harbor, but there can be little doubt that it also wanted to shower benefits on workers who were the incumbents' political supporters. . . . *Federal preemption doctrine evaluates what legislation does, not why legislators voted for it or what political coalition led to its enactment.* This statute does not affect people who spurn the state's largesse.

431 F.3d at 1007 (emphasis added).

[22] As noted previously, *supra* note 1, the only issue before us is whether AB 1889's grant and program fund restrictions, § 16645.2 and § 16645.7, are preempted by the NLRA or are constitutionally invalid. The statute's restriction on the use of *contract* funds, § 16645.4, is not at issue nor was it addressed by the district court, and the dissent errs in implying otherwise. (Dissent at 1098-1100.)

(1972) (internal quotation marks and citation omitted), but even were it not, the statute is not "overly broad and unconstitutional" (Dissent at 1100) because its restrictions on the use of grant and program funds have been "carefully drawn" to mirror the mechanics of constitutionally sound federal acts. *Gooding*, 405 U.S. at 522, 92 S.Ct. 1103; *see also Regan*, 461 U.S. at 549-50, 103 S.Ct. 1997.

It is even more implausible that AB 1889's restrictions on grant and program funds "alter [the funds'] use as legal tender" and frustrate the "basic tenets of our economic system." (Dissent at 1098, 1099) Again, the statute's text is precisely modeled on language the Congress itself has used. The Workforce Investment Act, for example, regulates federal funds given to state boards to be awarded as " *grants or contracts*, on a competitive basis, to eligible providers within the State or outlying area to enable the eligible providers to develop, implement, and improve adult education or literacy activities within the State." 20 U.S.C. § 9241(a) (emphasis added). The Workforce Investment Act also requires "[e]ach recipient of funds . . . [to] provide . . . assurances that none of such funds will be used to assist, promote, or deter union organizing." 29 U.S.C. § 2931(b)(7). AB 1889's exactly analogous requirement can hardly be antithetical to the monetary concept of free tender.[23]

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[23] The dissent also disregards the nature of state programs, which are run to serve public purposes and need not guarantee a profit to private companies. (Dissent at 1100.) For instance, in the MediCal program, which the Chamber of Commerce itself discusses in the context of nursing homes that are "entirely dependent on state funds," state funding is designed only to cover the costs of services performed. Notably, allowable costs under MediCal are also based on federal Medicare cost reporting standards, which provide that "[i]n determining such reasonable costs, costs incurred for *activities directly related to influencing employees respecting unionization may not be included*." 42 U.S.C. § 1395x(v)(1)(N) (emphasis added).

CONCLUSION

Because sections 16645.2 and 16645.7 of AB 1889 are not preempted under either *Machinists* or *Garmon* and do not on their face infringe plaintiffs' First Amendment rights, the judgment of the district court is **REVERSED** and its injunction is **VACATED**. We remand for further proceedings consistent with this opinion.

BEEZER, Circuit Judge, with whom KLEINFELD and CALLAHAN, Circuit Judges, join in dissent:

May a state leverage its spending power to induce an employer to adopt a neutral policy toward labor union organizing? The First Amendment, the National Labor Relations Act ("NLRA" or "the Act"), and well-established doctrines of preemption, demand an answer in the negative.

By extending the definition of "state funds" to include any monies received by a private employer as a result of contracting with the state, AB 1889 strikes at the heart of the First Amendment. AB 1889 prohibits not just the use of state money granted to an employer for and under a specific program but also co-opts the payment for goods and services and profit realized under a contract (undoubtedly not state funds). AB 1889's gag rules prevent any employer from spending its own funds in direct violation of the First Amendment.

The NLRA extends to employees the opportunity to render a free and informed choice about union representation. In doing so, the Act allows for robust debate of union representation issues by employers and employees alike. California Assembly Bill 1889, codified at Cal. Govt.Code § 16645-49, ("AB 1889" or "the statute"), stifles employers from fully participating in organizing and exercising the rights that are explicitly granted to them by Congress under the NLRA. The statute rides roughshod over the delicate balance established by Congress between labor

unions and employers. In addition, the California statute interferes with the NLRA's extension of exclusive jurisdiction to the National Labor Relations Board ("NLRB") for the adoption and enforcement of representation election rules. I would hold the federal preemption of the relevant provisions of the California statute to be complete.

I

AB 1889 is far from a neutral enactment that simply restricts use of undefined "state funds." It abrogates the First Amendment rights of employers to speak out and discuss union organizing campaigns. Under the guise of preserving state neutrality, the statute operates to impel employers themselves to take a position of neutrality with respect to labor relations, in direct conflict with employers' rights under the First Amendment.

AB 1889 applies to any vendor of goods or services who receives payouts from the State of California "in excess of ten thousand dollars in any calendar year on account of its participation in a state program." "State program" is not defined in the statute and this broad language brings under the auspices of the statute every purveyor of goods or services unlucky enough to cross the magic $10,000 threshold in its annual contracting with the state.[24] AB 1889's speech regulations and presumption that "state funds" have been spent on union-related expenditures allows the state to irrevocably stamp dollar bills with "Property of California," alter their use as legal tender and limit the items

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[24] The term contracting may suggest a more narrow application than that intended by AB 1889. AB 1889, as written, takes a programmatic approach to controlling the labor-management arena through its extensive reach to all businesses who have a financial involvement in state regulated activities. For example, hospitals or nursing homes that accept MediCal patients (a state program) are likely to receive over $10,000 in payments from California. The acceptance of these state payments subjects those payments and that vendor to the strictures of AB 1889.

an employer may purchase with those specific dollar bills. All this, despite the fact that the employer has fully performed under a contract and the state has received every item it is entitled to under the terms of the contract. AB 1889 writes a neutrality provision into every contract the state enters into without requiring the state to bargain or pay for such a pricey concession. The statute also fails to state where an employer may turn to recover any compliance costs that a labor organization may recover in a suit authorized by the Act-another unbargained for benefit gained by the state.

A statutory blanket prohibition on employers advocating for or against unions would blatantly violate the First Amendment as the state has no legitimate interest in prohibiting employers from speaking on union issues. Even the opinion of the court recognizes that the statute only passes constitutional muster if it is read to only apply to state funds. Opinion of the Court at 11794 ("Nor does it interfere with employers' exercise of their First Amendment rights, because employers remain free to use their own funds to advocate for or against unionization and are not required to accept neutrality as a condition for receipt of state funds."). Just because the majority closes it eyes and wishes it were so cannot alter the economic fact that AB 1889 both explicitly and implicitly does unconstitutionally require neutrality as a condition for contracting with the state. A state could not terminate a contract due to the contractor's speech, nor could it decide not to contract based on the employer's speech as either decision would violate the employer's First Amendment Rights. *Board of County Comm'rs, Wabaunsee County, Kansas v. Umbehr*, 518 U.S. 668, 116 S.Ct. 2342, 135 L.Ed.2d 843 (1996) (Government cannot retaliate against independent contractors for exercising First Amendment Rights).

Once the state has chosen to award a contract to the lowest responsible bidder, the state's interest in the funds it pays for the contracted goods and services is at end. It has made a bargain for the provision of a limited set of benefits and the

vendor has agreed to provide those goods and services, including labor, in exchange for money. Once the exchange has been made and payment has been received, that money can no longer be considered "state funds." The state has no interest in how those funds are spent by the vendor and the state has no 11810 right or reason to limit an individual who engages in a labor dispute from using its own money for any lawful purpose. Upon payment to the employer those funds became free tender and any attempt by the state to undermine the buying power of free tender by limiting the types of goods that can be purchased with funds in which the state is not vested with a residual interest is fundamentally opposed to the basic tenants of our economic system and the First Amendment.

Every reasonable employer will also have built into its contract a measure of profit. This profit is the earned compensation of the employer upon completion of its contractual duties. AB 1889 seeks to condition the uses to which an employer may put these specific funds. The problems with this profit-taking are most stark when considering the case of employers who conduct all of their business with the state. These employers can offer their employees bonuses, pay for all-inclusive vacations to Tahiti, throw extravagant parties with champagne and caviar, or simply bank their profits to save for a rainy day. What they cannot do, according to AB 1889, is hold a mandatory meeting to discuss unionization (either the benefits or burdens) with their employees. Employers who receive all of their revenue from the state have no other option but to cease all union-related speech. The opinion of the court has no mercy for these employers as it concludes that they have made their own bed through their "free-market choice." Simply because a business or individual chooses to contract with the state, or even accept employment from the state, does not mean that the state may abrogate First Amendment rights. *See, e.g. United States v. National Treasury Employees Union,* 513 U.S. 454, 115 S.Ct. 1003, 130

L.Ed.2d 964 (1995). Free market choice or not, these employers retain their First Amendment right to spend their own funds, as they undoubtedly earn by contracting with the state, as they see fit.

Because AB 1889 commandeers private employers own funds, in addition to regulating the use of state funds, I would hold that the statute is overly broad and unconstitutional under the First Amendment.

II

The NLRA is a comprehensive scheme designed to balance the rights and interests of both employers and employees and provides an administrative mechanism to resolve questions concerning union representation. Recognizing the extreme importance of the free flow of information, the NLRA explicitly protects rights of employers to express their views on union organizing efforts. The opinion of the court recognizes the importance of unrestricted speech and the free flow of information to the proper enactment of the Act but blithely and naively concludes that the California statute does not impede the flow of information to employees by regulating employers' speech. It ignores the application of AB 1889 to employers own funds, the intensely burdensome and one-sided regulatory scheme and the actual impact of the statute as amply demonstrated in the record.

A.

Congress' intent to protect the free-flow of information between employers and employees is embodied in Section 8(c) of the Act, which permits employers to articulate, in a non-coercive manner, their views regarding union organizing efforts:

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of

this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

29 U.S.C. § 158(c). Congress added Section 8(c) of the NLRA in 1947, "to insure both to employers and labor organizations full freedom to express their views to employees on labor matters. . . ." S. Rep. 80-105, at 23 (1947). Indeed, the explicit purpose of Section 8(c) was "to protect the right of free speech when what the employer says or writes is not of a threatening nature or does not promise a prohibited favorable discrimination." H.R.Rep. No. 80-510 (1947), *reprinted in* 1947 U.S.Code Cong. Serv. 1135, 1151.

The United States Supreme Court recognizes that "the enactment of § 8(c) manifests a congressional intent to encourage free debate on issues dividing labor and management." *Linn v. United Plant Guard Workers, Local 114,* 383 U.S. 53, 62, 86 S.Ct. 657, 15 L.Ed.2d 582 (1966). The Court also holds that "an employer's free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the Board." *NLRB v. Gissel Packing Co.,* 395 U.S. 575, 617, 89 S.Ct. 1918, 23 L.Ed.2d 547 (1969). The Congressional enactment of Secion 8(c), the Court explains, in conjunction with the First Amendment, allows employers to express "any of [their] general views about unionism or any of [their] specific views about a particular union" in a non-coercive manner. *Id.* at 618, 89 S.Ct. 1918.

Our case law has also consistently emphasized the importance of an employer's freedom of speech in labor relations matters. "Freedom of speech is an essential component of the labor-management relationship. Collective bargaining will not work, nor will labor disputes be susceptible to resolution, unless both labor and management are able to exercise their right to engage in 'uninhibited, robust, and wide-open' debate." *Steam Press Holdings v. Haw. Teamsters & Allied Workers Union, Local 996,* 302 F.3d 998, 1009 (9th Cir.2002) (quoting *New York Times v.*

Sullivan, 376 U.S. 254, 270, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964)). For a concise and accurate statement of the rule, we adopted the principle of free speech in union representation matters as crafted by the Fifth Circuit:

> The guaranty of freedom of speech and assembly to the employer and to the union goes to the heart of the contest over whether an employee wishes to join a union. It is the employee who is to make the choice and a free flow of information, the good and the bad, informs him as to the choices available.

NLRB v. TRW-Semiconductors, Inc., 385 F.2d 753, 760 (9th Cir.1967) (quoting *Southwire Co. v. NLRB,* 383 F.2d 235, 241 (5th Cir.1967)).

Our opinions have faithfully reiterated a "commit[ment] to the principle that debate in union campaigns should be vigorous and uninhibited," so long as the debate is free of coercion and retaliatory threats. *NLRB v. Lenkurt Elec. Co.,* 438 F.2d 1102, 1108 (citing *NLRB v. TRW-Semiconductors, Inc.,* 385 F.2d 753, 759-60 (9th Cir.1967)). "The exercise of free speech in these campaigns should not be unduly restricted by narrow construction. It is highly desirable that the employees involved in a union campaign should hear all sides of the question in order that they may exercise the informed and reasoned choice that is their right." *Id.; accord, Montgomery Ward & Co. v. NLRB,* 385 F.2d 760, 763 (8th Cir.1967) ("[T]he right of free speech guaranteed by the First Amendment and § 8(c) of the Act should not be defeated by narrow or strained construction.").

This protection of the speech of both employees and employers is the heart of Congress' design to protect and enhance union organizing. The NLRB supports this congressional policy of free speech, holding "that it will not restrict the right of any party to inform employees of the advantages and disadvantages of unions and of joining them as long as such information is imparted to employees in a noncoercive manner." *Trent Tube Co.,* 147 NLRB 538, 541

(1964) (internal quotation marks omitted); *see also United Technologies Corp.*, 274 NLRB 1069, 1074 (1985) ("[A]n employer has a fundamental right, protected by Section 8(c) of the Act, to communicate with its employees concerning its position in collective-bargaining negotiations and the course of those negotiations." (footnote omitted)).

B.

AB 1889 prohibits grantees and private employers from using funds received from the state "to assist, promote, or deter union organizing," which is defined to include "any attempt by an employer to influence the decision of its employees in this state or those of its subcontractors regarding . . . [w]hether to support or oppose a labor organization . . . or [w]hether to become a member of any labor organization." Cal. Gov't Code § 16645(a), 16645.2(a), 16645.7(a). The prohibited expenditures include the payments by an employer for legal and consulting fees relating to union organizing efforts as well as the salaries of supervisors and employees related in any respect to union organizing efforts. § 16646. The statute exempts several types of pro-union activities and expenses from the prohibition, including "[a]ddressing a grievance or negotiating or administering a collective bargaining agreement" and "[n]egotiating, entering into, or carrying out a voluntary recognition agreement with a labor organization." § 16647(a), (d).

The statute entails burdensome and detailed record-keeping. The statute requires that employers and grantees certify in advance that the state funds will not be used for speech and activities that are related to union organizing. § 16645.2(c), 16645.7(b). In addition, employers and grantees must maintain detailed records showing that none of the funds have been used for speech regarding labor relations. § 16645.2(c), 16645.7(c). Those records must be made available to the Attorney General upon request. *Id.* The statute presumes that, where funds are commingled,

state funds were used to assist, promote, or deter union organizing. § 16646(b).

The enforcement provisions place heavy burdens on affected employers. The statute renders employers and grantees liable for treble damages (i.e., the amount of state funds that were expended in violation of the statute, plus a civil penalty equal to twice the amount of those funds). § 16445.2(d), 16445.7(d). The Attorney General of California, or any private taxpayer, may file a lawsuit against a suspected violator "for injunctive relief, damages, civil penalties, and other appropriate equitable relief." § 16645.8(a). The statute awards a prevailing plaintiff, or certain prevailing taxpayer intervenors, attorney's fees and costs. § 16645.8(d). The statute does not award any attorney's fees or costs to a prevailing employer. By creating seemingly impossible compliance burdens, by means of onerous accounting requirements and the threat of lawsuits, the statute essentially mandates employer neutrality. The statute effectively halts employer campaigns to defeat labor organizing activity or even an employer's ability to offer an opinion on the merits of one union versus another. Similar to neutrality agreements, which are often sought by unions from employers, the California statute pushes employers to a policy of neutrality, which in turn helps facilitate union organizing. It is no surprise that the California statute was sponsored by the California Labor Federation, AFL-CIO, and supported by a phalanx of labor unions. Sen. Comm. on Industrial Relations, Comm. Rep. for 1999 Cal. Assemb. B. No. 1889, 1999-00 Reg. Sess., at 1 (June 28, 2000). Equally telling, a law firm which represented itself as "the largest Union-side labor law firm on the West Coast" wrote in a letter to the California Attorney General that AB 1889, if not halted by a court, would "have a significant positive effect on various [union] organization drives. . . ."

The statute carries a false air of evenhandedness. It purports to limit employers from using state funds to either

"promote" union organizing or "deter" union organizing. § 16645.2(a), 16645.7(a). What must be understood, of course, is that few, if any, employers will wish for their employees to vote for union representation. Rare, indeed, will the circumstance be where an employer will actually dedicate resources to encourage its employees to unionize. The California Teamsters revealed the true impact of the legislation in a letter to certain members of the California legislature when AB 1889 was under consideration. The California Teamsters Public Affairs Council "urged [an] 'aye' vote on AB 1889" because it "prohibit[s] employers who receive state funds from using those funds to *discourage* unionization" and will affect the "all too common practice" of "employer campaigns to defeat labor organizing activity." (emphasis added).

The compliance provisions are daunting. Employers must maintain records demonstrating a complete separation of state funds. These records must identify every expense at all related to a union organizing campaign, save for a few pro-union exceptions, and prove conclusively that such expenses do not derive from state funds. § 16645.2(c), 16445.7(c), 16646, 16647. The statute creates a presumption that the employer used state funds for unionization purposes unless proven otherwise. § 16646(b). This presumption applies even when an employer has sufficient private funds such that no state funds were actually expended. *Id.* . The statute's documentation demands, which require employers to track every moment of employee time and every expense that somehow relates to deterring union organizing efforts, operate to inhibit employers from opposing union representation drives at all.

To comply with the statute and continue to oppose unionization or speak out on the merits of one union versus another, an employer must create and maintain two completely separate accounting and payroll systems. This becomes necessary because the California statute requires the employer to monitor public and private funds and ensure

that the statute's mandate of fund separation is fulfilled. In addition, the statute requires the employer to engage in the virtually impossible task of allocating every single employer expense related to union organizing activity, including supervisor time and employee time, which must be meticulously logged and tracked.

The record before us shows that labor unions have leveraged the significant compliance burdens of the statute to enhance their bargaining position as against employers. After AB 1889 passed, unions began writing to the California Attorney General's office, alleging violations of the statute in an effort to coerce employers to abstain from distributing literature, retaining consultants and legal counsel, or otherwise communicating with employees about the advantages and disadvantages of employment in a union shop. One union wrote the Attorney General and alleged that an employer violated the statute because employees who were attending a mandatory meeting about union organizing were not paid with a separate paycheck for time that each employee spent at the meeting. Another union alleged a violation of the statute, with little factual support, but offered to "settle" the alleged violation if the employer agreed to enter into a neutrality agreement with the union. Yet another union alleged that an employer violated AB 1889 by hiring an attorney to represent it during an organizing drive without arranging to pay for these legal services from funds that were conclusively derived from a source other than the state. The attempts by the AFL-CIO, in briefs filed in this appeal, to downplay the decidedly pro-union impact of AB 1889 are belied by the record before the court. What that record teaches is that the unions' have and will aggressively use AB 1889 to gain a special advantage in labor disputes and thereby alter the balance of power between unions and employers.

In light of these burdens and this record it cannot be said with a straight face that the statute "does not affect an employer's ability to use its own funds in connection with

union organizing activity." Opinion of the Court at 1090. The significant and undeniable impact AB 1889 has on employers' speech rights means that not only does it violate the First Amendment, but it is undoubtedly preempted by the NLRA.

III

The Supreme Court's preemption doctrines as they relate to the NLRA have long been centered around reinforcing the "purpose of the Act[, which] was to obtain 'uniform application' of its substantive rules and to avoid the 'diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies.' "*NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144, 92 S.Ct. 373, 30 L.Ed.2d 328 (1971) (quoting *Garner v. Teamsters Union*, 346 U.S. 485, 490, 74 S.Ct. 161, 98 L.Ed. 228 (1953)). The Court has articulated "two distinct NLRA pre-emption principles" as expressed in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959) ("*Garmon* preemption"), and *Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132, 96 S.Ct. 2548, 49 L.Ed.2d 396 (1976) (" *Machinists* preemption"). *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 748, 748-49, 105 S.Ct. 2380, 85 L.Ed.2d 728 (1985).

I would hold that the preemption doctrines established in *Garmon* and *Machinists* completely preempt the relevant provisions of the California statute.

A.

The doctrine of "*Machinists* pre-emption preserves Congress' intentional balance between the uncontrolled power of management and labor to further their respective interests." *Bldg. & Trades Council v. Associated Builders ("Boston Harbor")*, 507 U.S. 218, 226, 113 S.Ct. 1190, 122 L.Ed.2d 565 (1993) (internal quotation marks omitted). Although cast nominally as an effort to ensure state neutrality, the California statute, by stifling speech rights of

employers and their ability to participate in a debate about the value of unions generally or advise employees as to which union is preferable, operates to significantly empower labor unions as against employers. In doing so, the statute destroys the delicate balance between labor unions and employers as mandated by Congress through the NLRA. For this initial reason, AB 1889 is preempted by the NLRA, pursuant to *Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132, 96 S.Ct. 2548, 49 L.Ed.2d 396 (1976).

Machinists preemption "is based on the premise that 'the use of economic pressure by the parties to a labor dispute is . . . part and parcel of the process of collective bargaining,'" which means that "neither a state nor the National Labor Relations Board is 'afforded flexibility in picking and choosing which economic devices of labor and management shall be branded unlawful.'" *Alameda Newspapers, Inc. v. City of Oakland*, 95 F.3d 1406, 1413 (9th Cir.1996) (quoting *Machinists*, 427 U.S. at 144, 149, 96 S.Ct. 2548).

Under the doctrine of *Machinists* preemption, a state cannot "deny[ ] one party . . . a weapon that Congress meant him to have available," because such a state regulation "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Machinists*, 427 U.S. at 150, 151, 96 S.Ct. 2548 (internal quotation marks omitted). Employers have a number of tools at their disposal in exercising their Section 8(c) rights to express their views on union organizing efforts. An employer is permitted, for example, to express its views about union representation to masses of employees, in mandatory meetings, on company time, so long as such speech does not occur within 24 hours of an election. *See Peerless Plywood Co.*, 107 NLRB 427, 429 (1953); *Livingston Shirt Corp.*, 107 NLRB 400, 409 (1953). Employers may dispatch supervisors to engage in one-on-one discussions during work time with employees about the negative effects of union representation, *see, e.g., Lenkurt*

Elec. Co., 438 F.2d at 1107-08, and may disseminate written anti-union materials, *Beverly Enterprises-Hawaii, Inc.*, 326 NLRB 335, 336 (1998) (holding that "the [e]mployer did not engage in objectionable conduct when its supervisors handed out flyers [even] at a time when the [e]mployer was enforcing its otherwise valid no-distribution rule against employees").

A state law that both explicitly targets and directly regulates processes controlled by the NLRA is preempted under the *Machinists* doctrine. Because AB 1889, on its face, directly regulates the union organizing process itself and imposes substantial compliance costs and litigation risk on employers who participate in that process using the statutorily protected self-help mechanisms, it interferes with an area Congress intended to leave free of state regulation. The statute hands a coercive weapon to those seeking to unionize by creating an ever present threat of consuming and expensive litigation should an employer deign to offer its opinion on the merits of unionization. The statute ties the hands of management financially and allows pro-union groups free reign.[25]

Preemption will prevail over the application of local law even when federal law does not expressly protect the conduct at issue if "the application of state law . . . would operate to

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[25] I note an additional manner in which AB 1889 alters the balance as established between labor unions and employers: AB 1889 comes dangerously close to rendering employers' financial records an open book, which federal labor law does not allow. Labor unions are permitted to receive employers' financial records under the NLRA only after winning an election and only for legitimate collective bargaining purposes. *See NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435-36, 87 S.Ct. 565, 17 L.Ed.2d 495 (1967). Under AB 1889, however, unions are able to bypass these federal limits and file lawsuits in state court, granting them access to employers' financial records in state court. With these records in hand, the unions would have additional leverage in advocating for a unionized workforce and place additional pressure on an employer to simply recognize a given union.

frustrate the purpose of the federal legislation." *Teamsters v. Morton,* 377 U.S. 252, 258, 260, 84 S.Ct. 1253, 12 L.Ed.2d 280 (1964) (noting also that a conflicting state law cannot be permitted to "frustrate the congressional determination to leave th[e] weapon of self-help available, and to upset the balance of power between labor and management expressed in our national labor policy"). *Machinists* affirms this notion, holding that "a particular activity might be protected by federal law not only when it [is explicitly protected by the NLRA], but also when it was an activity that Congress intended to be unrestricted by [a]ny governmental power to regulate." 427 U.S. at 141, 96 S.Ct. 2548 (internal quotation marks omitted).

An overriding principle of the NLRA is that the collective bargaining process cannot function unless both employers and employees have the ability to engage in open and robust debate concerning unionization. *See NLRB v. Jones & Laughlin Steel Corp.,* 301 U.S. 1, 45, 57 S.Ct. 615, 81 L.Ed. 893 (1937) ("The theory of the Act is that free opportunity for negotiation . . . may bring about the adjustments and agreements which the Act in itself does not attempt to compel."). The NLRA's declared purpose is to "restor[e] equality of bargaining power" by, among other ways, "encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment." 29 U.S.C. § 151.

By impeding the flow of information and any substantive discussion of unionization, the statute substantively regulates and disrupts "Congress' intentional balance between the uncontrolled power of management and labor to further their respective interests." *Boston Harbor,* 507 U.S. at 226, 113 S.Ct. 1190 (internal quotation marks omitted). The statute frustrates "effective implementation of the [NLRA's] processes," rendering pre-emption of the California statute

under *Machinists* appropriate. *Machinists*, 427 U.S. at 148, 96 S.Ct. 2548 (internal quotation marks omitted).

That California purports to act through its spending power rather than its regulatory power, is a "distinction without a difference." *Wisconsin Dep't of Indus. v. Gould, Inc.*, 475 U.S. 282, 287, 106 S.Ct. 1057, 89 L.Ed.2d 223 (1986). "[W]e cannot believe that Congress intended to allow States to interfere with the 'interrelated federal scheme of law, remedy, and administration,' under the NLRA as long as they did so through exercises of the spending power." *Id.* at 290, 106 S.Ct. 1057 (quoting *Garmon*, 359 U.S. at 243, 79 S.Ct. 773) (citation omitted). Although a state's ability to control the use of its funds is an important state interest, regulation that specifically targets and substantially affects the NLRA bargaining process will be preempted, even if such regulation comes in the form of a restriction on the use of state funds. *See Metropolitan Milwaukee Assn. of Commerce v. Milwaukee County*, 431 F.3d 277, 278-79 (7th Cir.2005).

B.

The doctrine of *Garmon* preemption exists to uphold national labor policy and to vindicate Congress' decision to "entrust[ ] administration of the labor policy for the Nation to a centralized administrative agency, armed with its own procedures, and equipped with its specialized knowledge and cumulative experience." *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 242, 246, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959). The California statute stifles employers' speech rights which are granted by federal law, and in doing so, impedes the ability of the NLRB to uphold its election speech rules and administer free and fair elections. I would hold that AB 1889 is also preempted under the *Garmon* doctrine.

In upholding the NLRA from state-law dilution, the Supreme Court has emphasized the importance of "delimiting areas of conduct which must be free from state

regulation if national policy is to be left unhampered." *Garmon*, 359 U.S. at 246, 79 S.Ct. 773. *Garmon* preemption is focused on avoiding "the potential conflict of two law-enforcing authorities, with the disharmonies inherent in two systems, one federal the other state, of inconsistent standards of substantive law and differing remedial schemes." *Id.* at 242, 79 S.Ct. 773.

There are two distinct circumstances under which *Garmon* preemption can emerge. *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 187, 98 S.Ct. 1745, 56 L.Ed.2d 209 (1978). The first preempts activity which is *actually* protected or prohibited by federal law, dictating that "[w]hen it is clear 11823 or may fairly be assumed that the activities which a State purports to regulate are protected [by the NLRA], due regard for the federal enactment requires that state jurisdiction must yield." *Garmon*, 359 U.S. at 244, 79 S.Ct. 773. The second form of *Garmon* preemption deals with activities that are merely either *arguably* protected or *arguably* prohibited by the Act. *Sears*, 436 U.S. at 187-88, 98 S.Ct. 1745. This second and distinct application of *Garmon* preemption holds that "[w]hen an activity is *arguably* subject [to the Act], the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." *Garmon*, 359 U.S. at 245, 79 S.Ct. 773 (emphasis added).

The first branch of the *Garmon* preemption doctrine is at issue, and preempts AB 1889. Congress' intent, the Supreme Court and Ninth Circuit precedent all lead inextricably to the conclusion that Section 8(c) of the NLRA *actually* grants and protects speech rights of employers. *See supra* § I. Because the Act is a comprehensive regulatory scheme, to say that an activity is not punishable by the Act is the equivalent of protecting that activity. AB 1889 encumbers these speech rights, and in doing so, interferes with the jurisdiction of the NLRB. Congress has directed the

NLRB to oversee elections and determine what conduct constitutes an unfair labor practice under the Act. *See* 29 U.S.C. § 158(a)(1). Broadly speaking, and consistent with Section 8(c) of the NLRA, the NLRB takes a *laissez faire* approach to employee and employer speech, allowing passionate, partisan debate to proceed during a union organizing campaign. *See Trent Tube Co.*, 147 NLRB 538, 541 (1964). At the same time, the NLRB has jurisdiction to regulate a certain bandwidth of employer speech, to ensure compliance with Section 8(c). *See Midland Nat'l Life Ins. Co.*, 263 NLRB 127, 133 (1982) ("[W]e will no[t] probe into the truth or falsity of the parties' campaign statements, and [ ] will not set elections aside on the basis of misleading campaign statements···· [But] we will continue to protect against other campaign conduct, such as threats, promises, or the like, which interferes with employee free choice."). For example, the NLRB has long enforced various "time, place, and manner" rules that bar certain types of campaign and speech activities in the vicinity of the polls or in the final hours before an election. *See Peerless Plywood Co.*, 107 NLRB at 429-30; *Milchem, Inc.*, 170 NLRB 362, 362-63 (1968). The NLRB has held that, consistent with Section 8(c), employers may hold mandatory meetings with employees about union organizing efforts, *Livingston Shirt Corp.*, 107 NLRB at 409, direct supervisors to informally discuss a representation campaign with employees, *see Stanley Oil Co.*, 213 NLRB 219, 225 (1974), and distribute anti-union literature to employees even when enforcing a no-solicitation rule to employees, *Beverly Enterprises-Hawaii*, 326 NLRB at 336.

The California statute regulates the same partisan employer speech that Congress committed to the jurisdiction of the NLRB. In doing so, AB 1889 discourages employer speech, which works at cross-purposes with the relaxed election speech rules established by the NLRB. Congress "entrusted [to the NLRB] . . . a wide degree of discretion in establishing the procedure and safeguards necessary to insure

the fair and free choice of bargaining representatives by employees." *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330, 67 S.Ct. 324, 91 L.Ed. 322 (1946). By discouraging employer speech, California directly usurps the ability of the NLRB to administer elections that will foster fair and free employee choice.

Far from hewing to the NLRA's goal of installing a "national labor policy of minimizing industrial strife," *Emporium Capwell Co. v. W. Addition Cmty. Org.*, 420 U.S. 50, 62, 95 S.Ct. 977, 43 L.Ed.2d 12 (1975), AB 1889 encourages additional litigation by allowing unions and the California Attorney General to bring proceedings in state court to attack the very partisan employer speech that the NLRB protects. California defies Congress' decision to "entrust[ ] to the Board alone" the criteria necessary to conduct a fair representation election. *NLRB v. Waterman S.S. Corp.*, 309 U.S. 206, 226, 60 S.Ct. 493, 84 L.Ed. 704 (1940).

"*Garmon* preemption is 'intended to preclude state interference with the National Labor Relations Board's interpretation and active enforcement of the integrated scheme of regulation established by the NLRA.'" *Alameda Newspapers*, 95 F.3d at 1412 (quoting *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 613, 106 S.Ct. 1395, 89 L.Ed.2d 616 (1986)); *see also Gould*, 475 U.S. at 286-89, 106 S.Ct. 1057. California's displacement of the NLRA's free speech protections and its interference with the NLRB render AB 1889 preempted under *Garmon*. *Garmon* preemption applies because AB 1889 "regulate[s] conduct so plainly within the central aim of federal regulation [that it] involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law," thus creating a "potential frustration of national purposes." *Garmon*, 359 U.S. at 244, 79 S.Ct. 773.

The opinion of the court avoids general *Garmon* preemption principles and replaces them with an overly narrow

view of the *Garmon* doctrine that is inapplicable to this dispute. The critical error of the opinion of the court lies in a misreading of *Sears, Roebuck & Company,* 436 U.S. 180, 98 S.Ct. 1745, and a misunderstanding of the form of *Garmon* preemption that applies to AB 1889.

The opinion of the court relies upon *Sears* for the proposition that *Garmon* preemption applies only when the controversy presented to the state court is identical to the controversy that would be presented to the NLRB. The opinion of the court fails to recognize, however, that this requirement of identicalness applies only to the type of *Garmon* preemption applied to those activities that are merely *arguably prohibited* by the Act. Because of heightened concerns rooted in the Supremacy Clause of the United States Constitution, the requirement of identicalness does not apply if the activity is either *arguably protected* or, as here, *actually* protected, by the Act. An analysis of *Sears* readily uncovers the misconception of the *Garmon* doctrine as expressed in the court's opinion filed today.

At issue in *Sears* was the power of a state court to hear a trespass lawsuit brought by an employer to enforce trespassing laws against union picketing. *Sears,* 436 U.S. at 182, 98 S.Ct. 1745. The Court first considered whether the picketing was " *arguably prohibited* " by federal law, which would be possible grounds for preemption. *Id.* at 190-98, 98 S.Ct. 1745 (emphasis added). The Court concluded that, with regard to activity which is arguably prohibited by the Act, *Garmon* preemption (and the accompanying risk of interference with the jurisdiction of the NLRB) emerges only when "the controversy is identical to . . . that which could have been, but was not, presented to the Labor Board." *Id.* at 197, 98 S.Ct. 1745. The Court concluded that the NLRB's inquiry regarding the arguably prohibited conduct would prove to be vastly different than an inquiry by the state court as to whether there was a trespass, and therefore, declined to find *Garmon* preemption.

The Court then turned to the question whether the *arguably protected* character of the union's picketing could lead to *Garmon* preemption. *Id.* at 199-207, 98 S.Ct. 1745. Preliminarily, the Court noted that "state-court interference with conduct actually protected by the act" invokes a "constitutional objection" rooted in the Supremacy Clause. *Id.* at 199, 98 S.Ct. 1745. Therefore, "[c]onsiderations of federal supremacy . . . are implicated to a greater extent when labor-related activity is protected than when it is prohibited." *Id.* at 200, 98 S.Ct. 1745. The Court concluded that even though the Union's peaceful, if trespassory, picketing could arguably be protected under the Act, such a trespass "is far more likely to be unprotected than protected." *Sears,* 436 U.S. at 205, 98 S.Ct. 1745. Therefore, the Court held, "the assertion of state jurisdiction [to adjudicate the alleged trespass] does not create a significant risk of prohibition of protected conduct." *Sears,* 436 U.S. at 207, 98 S.Ct. 1745. Notably, with regard to the *arguably protected* conduct of the picketing and trespass, the Court did *not* require (as it did with respect to *arguably prohibited* conduct) that the controversies before the NLRB and state court be identical before invoking *Garmon* preemption.

As this analysis of *Sears* indicates, the rule that *Garmon* preemption applies only when the state court and NLRB inquiries are identical only applies to activity which is *arguably prohibited* under the Act. With regard to conduct that is *arguably protected* under the Act, the standard under which preemption is found becomes less stringent because of heightened federal supremacy concerns. Accordingly, as compared to activity which is merely arguably prohibited by the Act, *Garmon* preemption is more readily found in relation to activity which is *arguably protected* or *actually protected* by the Act. 436 U.S. at 199-200, 98 S.Ct. 1745.

At issue with regard to AB 1889 is not a mere arguable prohibition or arguable protection granted by the NLRA. Rather, Section 8(c) of the NLRA constitutes an *explicit,*

actual protection which explicitly protects the speech rights of employers.

All along, the *Sears* Court explicitly disclosed that it was *not* addressing a case that involved *actually protected* conduct. *Sears*, 436 U.S. at 187, 98 S.Ct. 1745 ("The case is not, however, one in which 'it is clear or may fairly be assumed' that the subject matter which the state court sought to regulate . . . is either prohibited or protected by the Federal Act."). In light of the explicit speech protections granted by Section 8(c) of the NLRA, the *Sears* test of strict identicalness does not apply to a *Garmon* preemption analysis of AB 1889. Simply put, the opinion of the court's reliance on *Sears*, and its application of the test of identicalness between the NLRB's inquiry and the state court's inquiry, is misplaced.

The traditional *Garmon* analysis applies to the explicitly protected free speech rights of employers, and because AB 1889 interferes with those rights and undermines the speech rules and election procedures of the NLRB, I would hold that AB 1889 is preempted under *Garmon*.

IV

I must respectfully dissent because AB 1889 violates the First Amendment and is preempted under both *Machinists* and *Garmon*. The District Court properly entered summary judgment in favor of plaintiffs.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 03-55166

CHAMBER OF COMMERCE OF THE UNITED STATES; CALIFORNIA CHAMBER OF COMMERCE; EMPLOYERS GROUP; CALIFORNIA HEALTHCARE ASSOCIATION; CALIFORNIA MANUFACTURERS AND TECHNOLOGY ASSN.; CALIFORNIA ASSOCIATION OF HEALTH FACILITIES; CALIFORNIA ASSOCIATION OF HOME & SERVICES FOR THE AGING; BETTEC CORPORATION; MARKSHERM CORPORATION; ZILACO INC., ZILACO; DEL RIO HEALTHCARE, INC.; BEVERLY HEALTH & REHABILITATION SERVICES, INC. DBA BEVERLY MANOR COSTA MESA; INTERNEXT GROUP,
Plaintiffs-Appellees,

CALIFORNIA LABOR FEDERATION, AFL-CIO; AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS,
Intervenors-Appellants,

v.

BILL LOCKYER, ATTORNEY GENERAL, IN HIS CAPACITY AS ATTORNEY GENERAL OF THE STATE OF CALIFORNIA; DEPARTMENT OF HEALTH SERVICES; FRANK G. VANACORE, AS THE CHIEF OF THE AUDIT REVIEW AND ANALYSIS SECTION OF THE CALIFORNIA DEPARTMENT OF HEALTH SERVICES; DIANA M. BONTA, R.N., DR., PH.D, AS THE DIRECTOR OF THE CALIFORNIA DEPARTMENT OF HEALTH SERVICES,
Defendants.

No. 03-55169

CHAMBER OF COMMERCE OF THE UNITED STATES; CALIFORNIA CHAMBER OF COMMERCE; EMPLOYERS GROUP; CALIFORNIA HEALTHCARE ASSOCIATION; CALIFORNIA MANUFACTURERS AND TECHNOLOGY ASSN.; CALIFORNIA ASSOCIATION OF HEALTH FACILITIES; CALIFORNIA ASSOCIATION OF HOME & SERVICES FOR THE AGING; BETTEC

CORPORATION; MARKSHERM CORPORATION; ZILACO INC., ZILACO; DEL RIO HEALTHCARE, INC.; BEVERLY HEALTH & REHABILITATION SERVICES, INC. DBA BEVERLY MANOR COSTA MESA; INTERNEXT GROUP,
Plaintiffs-Appellees,

and

CALIFORNIA LABOR FEDERATION, AFL-CIO; AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS,
Intervenors-Appellants,

v.

BILL LOCKYER, ATTORNEY GENERAL, IN HIS CAPACITY AS ATTORNEY GENERAL OF THE STATE OF CALIFORNIA; DEPARTMENT OF HEALTH SERVICES; FRANK G. VANACORE, AS THE CHIEF OF THE AUDIT REVIEW AND ANALYSIS SECTION OF THE CALIFORNIA DEPARTMENT OF HEALTH SERVICES; DIANA M. BONTA, R.N., DR., PH.D, AS THE DIRECTOR OF THE CALIFORNIA DEPARTMENT OF HEALTH SERVICES,
Defendants-Appellants.

Appeal from the United States District Court for the Central District of California Gary L. Taylor, District Judge, Presiding.

Filed September 6, 2005.

Before: BEEZER and FISHER, , Circuit Judges, and ENGLAND,* District Judge.

Opinion by Judge BEEZER,; Dissent by Judge FISHER..

BEEZER, Circuit Judge:

The National Labor Relations Act, as amended, 29 U.S.C. § 151 et seq., extends to employees the opportunity to render a free and informed choice about union representation. In

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* The Honorable Morrison C. England, United States District Judge for the Eastern District of California, sitting by designation.

doing so, the Act allows for robust debate of union representation issues by employers and employees alike. The question presented is whether California Assembly Bill 1889, codified at Cal. Govt. Code § 15545-49, ("AB 1889" or "the statute"), which bars employers from spending "state funds" on union-related speech, is preempted by the National Labor Relations Act.[1]

As we explain, the California statute chills employers from exercising their free speech rights that are explicitly protected by Congress under the National Labor Relations Act. In doing so, the statute undermines the delicate balance established by Congress as between labor unions and employers. In addition, the California statute interferes with the National Labor Relations Act's extension of exclusive jurisdiction to the National Labor Relations Board ("NLRB") for the adoption and enforcement of representation election rules.

Appellants California and the AFL-CIO vigorously defend the statute, arguing that California may spend its funds in a manner that it sees fit. The Supreme Court teaches, however, that the use of the state spending power is rarely a defense to state interference with the National Labor Relations Act. *Wisconsin Dep't of Indus., Labor, and Human Relations v. Gould,* 475 U.S. 282, 290, 290-91, 106 S.Ct. 1057, 89 L.Ed.2d 223 (1986) (emphasizing that Congress would not have intended to allow states to interfere with the NLRA "as

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[1] At issue in this appeal are all provisions of AB 1889, except for sections 16645.1, 16645.3, 16645.4, 16645.5, and 16645.6, which deal with state contractors and public employers. These sections are not at issue because the district court held that plaintiffs lacked standing to challenge these provisions, except for § 16645.5. *See Chamber of Commerce v. Lockyer,* 225 F.Supp.2d 1199, 1202-03 (C.D.Cal.2002). The parties further stipulated, and the district court agreed, that summary judgment as to § 16645.5 be denied without prejudice and that the plaintiffs' challenges to sections 16645.1, 16645.3, 16645.4, 16645.5, and 16645.6 be stayed.

long as they did so through exercises of the spending power"). The California statute is regulatory in nature, and is not focused on the police power, state procurement concerns, or local economic needs. Implementation by means of the state spending power does not save AB 1889 from preemption.

We previously filed an opinion in this case, which we withdrew upon granting appellants' Petition for Panel Rehearing. *Chamber of Commerce v. Lockyer,* 364 F.3d 1154 (9th Cir.2004), *reh'g granted and withdrawn,* 408 F.3d 590 (9th Cir.2005). Today, we decide the matter anew, and we affirm the district court's holding[2] that the National Labor Relations Act preempts AB 1889.

I

Before addressing employers' speech rights and embarking upon a preemption analysis, we introduce and analyze the California statute at issue.

A

Section 16645.2(a) of the California statute prohibits a "recipient of a grant of state funds" from "us[ing] the funds to assist, promote, or deter union organizing." Similarly, section 16645.7(a) bars private employers who receive more than ten thousand dollars of state funds in a calendar year from "us[ing] any of those funds to assist, promote, or deter union organizing."

The statute defines "assist[ing], promot[ing], or deter[ring] union organizing" as "any attempt by an employer to influence the decision of its employees in this state or those of its subcontractors regarding . . . [w]hether to support or oppose a labor organization that represents or seeks to represent those employees . . . or [w]hether to

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[2] We review the district court's preemption analysis and grant of summary judgment de novo. *Bank of Am. v. City & County of San Francisco,* 309 F.3d 551, 557 (9th Cir.2002).

become a member of any labor organization." Cal. Gov't Code § 16645(a). The statute prohibits *"any expense,* including legal and consulting fees and salaries of supervisors and employees, incurred for research for, or preparation, planning, or coordination of, or carrying out, an activity to assist, promote, or deter union organizing." § 16646(a) (emphasis added). The statute exempts several types of pro-union activities and expenses from the prohibition, including "[a]ddressing a grievance or negotiating or administering a collective bargaining agreement," "[a]llowing a labor organization or its representatives access to the employer's facilities or property," and "[n]egotiating, entering into, or carrying out a voluntary recognition agreement with a labor organization." § 16647(a), (b), (d).

The statute requires burdensome and detailed record-keeping. Employers and grantees must maintain detailed records showing that none of the funds have been used for speech regarding labor relations. § 16645.2(c), 16645.7(c). Those records must be produced for inspection by the Attorney General upon request. *Id.* The statute presumes that, where state and non-state funds are commingled, state funds were used to assist, promote, or deter union organizing. § 16646(b). The plaintiffs aptly characterize this feature as the "commingling trap," because a mere technical failure to keep records can constitute a violation even when no state funds were actually expended. The statute requires that employers and grantees certify in advance that the state funds will not be used for speech and activities that are related to union organizing. § 16645.2(c), 16645.7(b).

The enforcement provisions place heavy burdens on affected employers who accept state funds. The statute renders employers and grantees liable for treble damages (i.e., the amount of state funds that were expended in violation of the statute, plus a civil penalty equal to twice the amount of those funds). § 16645.2(d), 16645.7(d).

The Attorney General of California, or any private taxpayer, may file a lawsuit against a suspected violator "for injunctive relief, damages, civil penalties, and other appropriate equitable relief." § 16645.8(a). The statute awards a prevailing plaintiff, and certain prevailing taxpayer intervenors, attorney's fees and costs. § 16645.8(d). The statute does not provide for the award of any attorney's fees or costs to a prevailing employer or grantee.

B

We conclude that the California statute, which is far from the neutral enactment that appellants contend it to be, significantly undermines the speech rights of employers related to union organizing campaigns. Under the guise of preserving state neutrality, the statute operates to impel employers themselves to take a position of neutrality with respect to labor relations, in direct conflict with employers' rights as granted by the National Labor Relations Act.

By creating exacting compliance burdens, strict accounting requirements, the threat of lawsuits, and onerous penalties, the statute chills employer speech on the merits of unionism. The potential costs of litigation, plus the threat of severe penalties threaten to effectively halt employer campaigns to defeat labor organizing activity. Similar to neutrality agreements, which are often sought by unions from employers, the California statute pushes employers to a policy of neutrality, which in turn helps facilitate union organizing. And the statute's grant of a private right of action raises the specter that unions will file suits not to recover on claims for allegedly misspent funds, but rather to obtain bargaining leverage in a labor dispute.[3] The California statute was sponsored by the California Labor Federation, AFL-CIO, and supported by a number of labor

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[3] As it turns out, lawsuits and the threat thereof for unions to obtain leverage in a union organizing dispute is not a mere theoretical possibility. *See* Part I.C, *infra*.

organizations. Sen. Comm. on Industrial Relations, Comm. Rep. for 1999 Cal. Assemb. B. No. 1889, 1999-00 Reg. Sess., at 1 (June 28, 2000).[4]

The statute carries a false air of evenhandedness. It purports to limit employers from using state funds to either "promote" union organizing or "deter" union organizing. § 16645.2(a), 16645.7(a). What must be understood, of course, is that few, if any, employers will wish for their employees to vote for union representation. Rare, indeed, will the circumstance be where an employer will actually dedicate resources to encourage its employees to unionize. For this reason, the statute's prohibition on spending state funds to "assist" or "promote" union organizing is meaningless, particularly when taking into account the pro-union exceptions contained in section 16647. Hence, the overriding primary effect of the statute is focused and one-sided: to prevent the expenditure of money which seeks to "deter union organizing."

The California Teamsters telegraphed this impact of the legislation in a letter to certain members of the California legislature when AB 1889 was under consideration. The California Teamsters Public Affairs Council "urged [an] 'aye' vote on AB 1889" because it "prohibit[s] employers who receive state funds from using those funds to *discourage* unionization" and will affect the "all too common practice" of "employer campaigns to defeat labor organizing activity." (emphasis added). In addition, a law firm which represented itself as "the largest Union-side labor law firm on the West Coast" wrote in a letter to the California Attorney General that AB 1889, if not halted by a court, would "have a

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[4] The Chamber of Commerce argues that the California statute is "part of a state-by-state effort to de facto rewrite the NLRA." The State of New York was recently enjoined from enforcing a statute which is similar to AB 1889. *See Healthcare Ass'n of New York State, Inc. v. Pataki*, No. 1:03-CV-0413, 388 F.Supp.2d 6, 2005 WL 1155687 (N.D.N.Y. May 17, 2005).

significant positive effect on various [union] organizing drives . . . ."

The compliance provisions are daunting. Employers must maintain records demonstrating a complete separation of state funds. These records must identify every expense at all related to a union organizing campaign, save for a few pro-union exceptions, and prove conclusively that expenditures for such purposes do not derive from state funds. § 16645.2(c), 16645.7(c), 16646, 16647. The statute creates a presumption that the employer used state funds for a prohibited purpose unless proven otherwise. § 16646(b). This presumption applies even when an employer has sufficient private funds such that no state funds were actually expended. *Id.*

The documentation demands of the statute, which require employers to track every moment of employee time and every expense that somehow relates to deterring union organizing efforts, operate to inhibit employers from opposing union representation drives at all. *See* Cal. Gov't Code § 16646(a) (requiring documentation of *"any expense,* including . . . salaries of supervisors and employees, incurred for research for, or preparation, planning, or coordination of, or carrying out, an activity to . . . deter union organizing") (emphasis added). To comply with the statute and continue to exercise its free speech rights, an employer would be required to create accurate and expensive accounting and payroll systems which identify, isolate, and allocate every expenditure, no matter how small, related to assisting, promoting, or deterring union organizing. The statute's "commingling trap" ensures that a failure to allocate an expenditure correctly leads to a presumption that state funds were expended for a prohibited purpose. Unions have capitalized on these strict record-keeping provisions, threatening and sometimes taking legal action based on (often unsupported) allegations that employers have not kept

adequate records demonstrating a separation of state funds. *See* Part I.C, *infra.*

Unions are authorized to commence lawsuits or to intervene in a lawsuit demanding an audit, injunctive relief, damages, and civil penalties. § 16645.8(a). With the benefit of the statute and the civil discovery process, unions are able to file a suit to pursue a fishing expedition or otherwise distract an employer during union organizing.[5] The statute allows for treble damages, which further chills employer speech by creating a further disincentive to even attempt to present any adverse comment on union organizing activity in the first instance. § 16645.2(d), 16645.7(d).

AB 1889 might be most problematic with regard to employers and grantees who receive 100% of their revenues from the state. If AB 1889 were in effect, those employers would have no ability whatsoever to exercise their federal statutory rights to communicate their views about a union organizing effort.

Not only does the statute muster California's public funds to regulate labor relations, but it also commandeers employers' *own* money and dictates to these private employers how they shall spend their money. Private money

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[5] In this connection, we note an additional manner in which AB 1889 alters the balance as established by Congress between labor unions and employers: AB 1889 comes dangerously close to rendering employers' financial records an open book, which federal labor law does not allow. Labor unions are permitted to receive employers' financial records under the National Labor Relations Act only after winning an election and only for legitimate collective bargaining purposes. *See NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435-36, 87 S.Ct. 565, 17 L.Ed.2d 495 (1967); *NLRB v. Truitt Manufacturing Co.*, 351 U.S. 149, 153, 76 S.Ct. 753, 100 L.Ed. 1027 (1956). Under AB 1889, however, unions are able to bypass these federal limits and file lawsuits in state court, granting them access to employers' financial records in state court. With these records in hand, the unions would have additional leverage in advocating for a unionized workforce and place additional pressure on an employer to simply recognize a given union.

comes into play because when a state pays an employer for goods or services, there is an amount of profit subsumed within the payment. That profit is no longer the state's money, but is ultimately transformed into the earned compensation of the employer. The California statute prohibits an employer from using even this profit to discuss the advantages and disadvantages of union organizing efforts with employees. The same difficulty with the interplay of private funds emerges with the statute's presumption that state funds have been spent on union-related expenditures, even when an employer has a commingled account with sufficient private funds so that no public money need be actually spent.[6]

C

The substantial record before us demonstrates that labor unions have leveraged the significant compliance burdens of the statute to enhance their bargaining position as against employers. After AB 1889 passed, unions began writing to the California Attorney General's office, alleging violations of the statute in an effort to coerce employers to abstain from distributing anti-union literature, retaining consultants and legal counsel, or otherwise communicating with employees about the advantages and disadvantages of employment in a union shop.

The record before us contains numerous threatening complaints that labor unions have sent to employers and the California Attorney General. One union wrote the Attorney General and alleged that an employer violated the statute by illegally commingling state funds. The basis for the

[6] The statute would not be saved from preemption even if it did not commandeer an employer's own funds, because our decision is rooted in the statute's leverage of state funds to regulate labor relations in a manner that interferes with, and therefore is preempted by, federal law. The statute's command over an employer's own funds constitutes an independent problem with AB 1889, a problem upon which our holding does not rest.

allegation? That employees who were attending a mandatory meeting about union organizing were not paid with a separate paycheck for time that each employee spent at the meeting. Another union alleged a violation of the statute, with little factual support, but offered to "settle" the alleged violation if the employer agreed to enter into a neutrality agreement with the union. Yet another union alleged that an employer violated AB 1889 by hiring an attorney to represent it during an organizing drive without arranging to pay for these legal services from funds that were conclusively derived from a source other than the state.

Several lawsuits have also been filed against employers pursuant to AB 1889. In one lawsuit the California Attorney General sued Fountain View, Inc. a nursing home operator, demanding that Fountain View turn over records to demonstrate that no state funds were used in conveying its views on union organizing efforts. For good measure, the California Attorney General also demanded that the nursing home pay "attorneys' fees and costs" related to the suit.

In a different case, the Service Employees International Union, Local 399 ("Service Union"), took a very aggressive approach, deciding to sue the employer itself, AB Crispino & Company ("Crispino"), a company which also operates nursing home facilities. At the time, the Service Union was a member union of the AFL-CIO and was represented by the same legal counsel who represent appellant-intervenor AFL-CIO before us in this appeal. The Service Union alleged that the nursing home "unlawfully has used State funds to deter union organizing by its employees, and unlawfully has failed to maintain records sufficient to show that State funds were not so misused." It was not just the use of state funds that the Union alleged as a basis for the suit, but also that Crispino "co-mingled State funds and non-State funds in common accounts" and "failed to maintain records sufficient to show that it had used no State funds" with regard to the union organizing efforts. The Service Union suit further charged that the alleged violation of AB 1889 constitutes a

per se violation of California Business and Professions Code § 17200, as an "unlawful or unfair business act or practice." The lawsuit demanded a number of remedies, including an injunction, an accounting of Crispino's expenses, treble damages, and restitution, together with "attorneys' fees, investigative expenses, and costs of suit." Appellant-Intervenor AFL-CIO is hardly in a position to downplay the merit of the suit against Crispino under AB 1889, because the Service Union was then affiliated with the AFL-CIO, and some of the same lawyers that represent the AFL-CIO on appeal before us filed the suit against Crispino.

The activities of the Service Employees International Union reveal that they continued to press employers who receive California government funds to unionize or else face penalties under AB 1889. One of the same lawyers who represents the AFL-CIO before us and the Service Union against Crispino, also represented Service Union, Local 250 against The Ensign Group, which operates at least one nursing home in California, referred to as the Sonoma Healthcare Center. The lawyer, representing the union, wrote to the California Attorney General, alleging that the union believed that the Ensign Group violated AB 1889 by "fail[ing] to maintain records sufficient to show that no state funds were used for its anti-union activities" and by conducting the anti-union activities from accounts where state funds were commingled. If the Ensign Group could not present adequate evidence to disprove his allegations, the attorney "request[ed] that [the Attorney General] commence a civil action against Sonoma under Section 16645.8 for injunctive relief, damages, civil penalties, and other appropriate equitable relief."

The Ensign Group, faced with the prospect of a lawsuit from either the union or the Attorney General because of the favorable status AB 1889 affords union interests, responded that the union's "accusation of improper use of State funds at Sonoma Healthcare is reckless and without factual basis." General Counsel for the Ensign Group noted his "surprise[ ]

that [the union's attorney] would suggest that his client's stated but unsupported belief in these spurious allegations should be sufficient to mobilize and expend the resources of the Attorney General's Office and the State of California in this manner." What the record actually teaches is that the unions' aggressive use of AB 1889 to gain a special advantage in labor disputes, and thereby alter the balance of power between unions and employers, is no surprise at all. That the unions' use of AB 1889 has been effected by appellants themselves and their legal representatives-the State of California in the Fountain View case, and the AFL-CIO and its own lawyers in the lawsuit against Crispino and the threatened lawsuit against The Ensign Group-undermines their arguments, made in these proceedings on appeal, that downplay the decidedly pro-union impact of the California statute.

II

Our preemption analysis begins with the National Labor Relations Act, which protects the rights of employers and employees and provides an administrative mechanism to resolve questions concerning union representation. We hold that Section 8(c) of the National Labor Relations Act, codified at 29 U.S.C. § 158(c), explicitly protects the right of employers to express their views about unions and union organizing efforts.

A

Section 8(c), codified at 29 U.S.C. § 158(c), permits employers to articulate, in a non-coercive[7] manner, their views regarding union organizing efforts:

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of

[7] For simplicity, we refer to speech that "contains no threat of reprisal or force or promise of benefit," 29 U.S.C. § 158(c), as "non-coercive."

this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

29 U.S.C. § 158(c).

Although the National Labor Relations Act was originally enacted in 1935, Congress added Section 8(c) of the NLRA in 1947, "to protect the right of free speech when what the employer says or writes is not of a threatening nature or does not promise a prohibited favorable discrimination." H.R.Rep. No. 80-510 (1947), *reprinted in* 1947 U.S.Code Cong. Serv. 1135, 1151. The purpose of Section 8(c) was "to insure both to employers and labor organizations full freedom to express their views to employees on labor matters . . . ." S. Rep. 80-105, at 23 (1947).

The National Labor Relations Act is a comprehensive regulatory scheme governing labor relations. *See, e.g., Bhd. of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 383, 89 S.Ct. 1109, 22 L.Ed.2d 344 (1969). The Act's preeminent mode of regulation operates by defining a series of prohibitions on employer and union conduct, called "unfair labor practices." *See* 29 U.S.C. § 158(a) (defining unfair labor practices if committed by employers); 29 U.S.C. § 158(b) (defining unfair labor practices if committed labor organizations). An actor who is alleged to have committed an unfair labor practice may be subject to a Board proceeding and if found to have committed an unfair labor practice, the Board may impose various remedies. *See* 29 U.S.C. § 160.

Because the Act is a comprehensive regulatory scheme, to say that an activity is *not punishable* by the Act, which is what Section 8(c) dictates, is the equivalent of protecting that activity. Section 8(c) specifically precludes non-coercive employer speech from constituting as an unfair labor practice, or even evidence thereof. In other words, because the Act's comprehensive scheme declares non-coercive employer speech to be non-punishable, employers are free to

engage in it. Non-coercive employer speech is thus protected by the Act's comprehensive regulatory scheme.

The United States Supreme Court recognizes that "the enactment of § 8(c) manifests a congressional intent to encourage free debate on issues dividing labor and management." *Linn v. United Plant Guard Workers, Local 114,* 383 U.S. 53, 62, 86 S.Ct. 657, 15 L.Ed.2d 582 (1966). Accordingly, a state defamation statute was partially preempted by the NLRA, to "guard[ ] against abuse of libel actions and unwarranted intrusion upon free discussion envisioned by the Act." *Id.* at 65, 86 S.Ct. 657. The Court reiterates that "an employer's free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the Board." *NLRB v. Gissel Packing Co.,* 395 U.S. 575, 617, 89 S.Ct. 1918, 23 L.Ed.2d 547 (1969). The Congressional enactment of § 8(c), the Court explains, in conjunction with the First Amendment, allows employers to express "any of [their] general views about unionism or any of [their] specific views about a particular union" in a non-coercive manner. *Id.* at 618, 89 S.Ct. 1918.

We turn to discuss the longstanding importance of employer free speech to the National Labor Relations Act, which reinforces our holding that Section 8(c) of the Act protects non-coercive employer speech.

B

Although there are certain limits on employer speech-such as speech that is coercive or threatening-the National Labor Relations Act pivots on the notion that employers and employees may freely discuss their views about union organizing efforts.

The National Labor Relations Board has supported the congressional policy of free speech, holding "that it will not restrict the right of any party to inform employees of the advantages and disadvantages of unions and of joining them as long as such information is imparted to employees in a

noncoercive manner." *Trent Tube Co.*, 147 NLRB 538, 541 (1964) (internal quotation marks omitted); *see also United Technologies Corp.*, 274 NLRB 1069, 1074 (1985) ("[A]n employer has a fundamental right, protected by Section 8(c) of the Act, to communicate with its employees concerning its position in collective-bargaining negotiations and the course of those negotiations.") (footnote omitted).

Employers have a number of tools at their disposal in exercising their Section 8(c) rights to express their views on union organizing efforts. An employer is permitted, for example, to express its views about union representation to masses of employees, in mandatory meetings, on company time, so long as such speech does not occur within 24 hours of an election. *See Peerless Plywood Co.*, 107 NLRB 427, 429 (1953); *Livingston Shirt Corp.*, 107 NLRB 400, 409 (1953). Employers may dispatch supervisors to engage in one-on-one discussions during work time with employees about the negative effects of union representation, *see, e.g., NLRB v. Lenkurt Elec. Co.*, 438 F.2d 1102, 1107-08 (9th Cir.1971), and may disseminate written anti-union materials, *Beverly Enterprises-Hawaii, Inc.*, 326 NLRB 335, 336 (1998) (holding that "the [e]mployer did not engage in objectionable conduct when its supervisors handed out flyers [even] at a time when the [e]mployer was enforcing its otherwise valid no-distribution rule against employees.").

Our opinions have faithfully reiterated our "commit[ment] to the principle that debate in union campaigns should be vigorous and uninhibited," so long as the debate is free of coercion and retaliatory threats. *Lenkurt Elec.*, 438 F.2d at 1108 (citing *N.L.R.B. v. TRW-Semiconductors, Inc.*, 385 F.2d 753, 759-60 (9th Cir.1967)). "The exercise of free speech in these campaigns should not be unduly restricted by narrow construction. It is highly desirable that the employees involved in a union campaign should hear all sides of the question in order that they may exercise the informed and reasoned choice that is their right." *Id.; accord, Montgomery Ward & Co. v. NLRB*, 385 F.2d 760, 763 (8th Cir.1967)

("[T]he right of free speech guaranteed by the First Amendment and § 8(c) of the Act should not be defeated by narrow or strained construction.").

Much like modern political campaigns, union organizing campaigns are fiercely contested, but the National Labor Relations Board "has allowed wide latitude to the competing parties. It is clear that the Board does not police or censor propaganda used in the elections it conducts, but rather leaves to the good sense of the voters the appraisal of such matters, and to opposing parties the task of correcting inaccurate and untruthful statements." *Linn,* 383 U.S. at 60, 86 S.Ct. 657 (internal quotation marks and footnote omitted); *see also Midland Nat'l Life Ins. Co.,* 263 NLRB 127, 133 (1982) ("[W]e rule today that we will no longer probe into the truth or falsity of the parties' campaign statements, and that we will not set elections aside on the basis of misleading campaign statements."); *NLRB v. Yellow Transp. Co.,* 709 F.2d 1342, 1343 (9th Cir.1983) (recognizing *Midland).*

We have consistently emphasized the importance of an employer's freedom of speech in labor relations matters. "Freedom of speech is an essential component of the labor-management relationship. Collective bargaining will not work, nor will labor disputes be susceptible to resolution, unless both labor and management are able to exercise their right to engage in 'uninhibited, robust, and wide-open' debate." *Steam Press Holdings v. Haw. Teamsters & Allied Workers Union, Local 996,* 302 F.3d 998, 1009 (9th Cir.2002) (quoting *New York Times v. Sullivan,* 376 U.S. 254, 270, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964)). For a concise and accurate statement of the rule, we have adopted the principle of free speech in union representation matters as crafted by the Fifth Circuit:

> The guaranty of freedom of speech and assembly to the employer and to the union goes to the heart of the contest over whether an employee wishes to join a union. It is the employee who is to make the choice and a free flow of

> information, the good and the bad, informs him as to the choices available.

NLRB v. TRW-Semiconductors, Inc., 385 F.2d 753, 760 (9th Cir.1967) (quoting *Southwire Co. v. NLRB*, 383 F.2d 235, 241 (5th Cir.1967)).

C

Congress chose to explicitly protect non-coercive employer speech from punishment under the Act. The National Labor Relations Act's comprehensive scheme protects non-coercive employer speech, because it is fundamental in allowing fair and free representation elections.

We turn to discuss federal preemption principles, with a keen eye toward whether the California statute interferes with employers' federally protected free speech rights on union matters.

III

The Supreme Court's preemption doctrines as they relate to the National Labor Relations Act have long been centered around reinforcing the "purpose of the Act[, which] was to obtain 'uniform application' of its substantive rules and to avoid the 'diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies.'" *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144, 92 S.Ct. 373, 30 L.Ed.2d 328 (1971) (quoting *Garner v. Teamsters Union*, 346 U.S. 485, 490, 74 S.Ct. 161, 98 L.Ed. 228 (1953)). Congressional intent is the ultimate touchstone of any preemption analysis. *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 747, 105 S.Ct. 2380, 85 L.Ed.2d 728 (1985) (*"Metropolitan Life"*).

The Supreme Court has articulated "two distinct NLRA pre-emption principles" as expressed in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959) ("*Garmon* preemption"), and *Machinists v. Wisconsin Employment Relations Commission*, 427 U.S.

132, 96 S.Ct. 2548, 49 L.Ed.2d 396 (1976) (" *Machinists* preemption"). *Metropolitan Life*, 471 U.S. at 748, 748-49, 105 S.Ct. 2380. We analyze the doctrines in turn and hold that *Garmon* preemption and *Machinists* preemption each completely preempts the provisions of the California statute before us.

A

The doctrine of *Garmon* preemption exists to uphold national labor policy and to vindicate Congress's decision to "entrust[ ] administration of the labor policy for the Nation to a centralized administrative agency, armed with its own procedures, and equipped with its specialized knowledge and cumulative experience." *Garmon*, 359 U.S. at 242, 246, 79 S.Ct. 773. The California statute stifles employers' speech rights which are granted by federal law, and in doing so, impedes the ability of the National Labor Relations Board to uphold its election speech rules and administer free and fair elections. We hold that AB 1889 is completely preempted under the *Garmon* doctrine.

In upholding the National Labor Relations Act from state-law dilution, the Supreme Court has emphasized the importance of "delimiting areas of conduct which must be free from state regulation if national policy is to be left unhampered." *Garmon*, 359 U.S. at 246, 79 S.Ct. 773. *Garmon* preemption is focused on avoiding "the potential conflict of two law-enforcing authorities, with the disharmonies inherent in two systems, one federal the other state, of inconsistent standards of substantive law and differing remedial schemes." *Id.* at 242, 79 S.Ct. 773.

There are three forms of *Garmon* preemption, depending on the status of the conduct that the state attempts to regulate: (1) where the conduct is *actually* protected or prohibited by the NLRA; (2) where the conduct is arguably prohibited by the NLRA; and (3) where the conduct is arguably protected by the NLRA. *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S.

180, 98 S.Ct. 1745, 56 L.Ed.2d 209 (1978). Because section 8(c) actually protects employers' speech rights in the labor relations context, the first and strongest form of *Garmon* preemption applies. At issue in *Sears* was the power of a state court to hear a trespass lawsuit brought by an employer to enforce trespassing laws against union picketing. *Sears*, 436 U.S. at 182, 98 S.Ct. 1745. All along, the *Sears* Court explicitly disclosed that it was *not* addressing a case that involved *actually* protected or prohibited conduct. *Sears*, 436 U.S. at 187, 98 S.Ct. 1745 ("The case is not, however, one in which 'it is clear or may fairly be assumed' that the subject matter which the state court sought to regulate ··· is either prohibited or protected by the Federal Act.").

The *Sears* Court, assessing the second type of *Garmon* preemption, considered whether the picketing was *"arguably prohibited"* by federal law, which would be possible grounds for preemption. *Id.* at 190-98, 98 S.Ct. 1745 (emphasis added). The Court concluded that, with regard to activity which is arguably prohibited by the Act, *Garmon* preemption (and the accompanying risk of interference with the jurisdiction of the NLRB) emerges only when "the controversy is identical to ··· that which could have been, but was not, presented to the Labor Board." *Id.* at 197, 98 S.Ct. 1745. The Court concluded that the NLRB's inquiry regarding the arguably prohibited conduct would prove to be vastly different than an inquiry by the state court as to whether there was a trespass, and therefore, declined to find *Garmon* preemption.

The Court turned to the question whether the *arguably protected* character of the union's picketing could lead to *Garmon* preemption. *Id.* at 199-207, 98 S.Ct. 1745. Preliminarily, the Court noted that "state-court interference with conduct actually protected by the act" invokes a "constitutional objection" rooted in the Supremacy Clause. *Id.* at 199, 98 S.Ct. 1745. Therefore, "[c]onsiderations of federal supremacy . . . are implicated to a greater extent when labor-related activity is protected than when it is

prohibited." *Id.* at 200, 98 S.Ct. 1745. The Court concluded that even though the Union's peaceful, if trespassory, picketing could arguably be protected under the Act, such a trespass "is far more likely to be unprotected than protected." *Sears,* 436 U.S. at 205, 98 S.Ct. 1745. The Court held, "the assertion of state jurisdiction [to adjudicate the alleged trespass] does not create a significant risk of prohibition of protected conduct." *Sears,* 436 U.S. at 207, 98 S.Ct. 1745. Notably, with regard to the *arguably protected* conduct of the picketing and trespass, the Court did *not* require (as it did with respect to *arguably prohibited* conduct) that the controversies before the NLRB and state court be identical before invoking *Garmon* preemption.

The strongest form of *Garmon* preemption applies to activity which is *actually* protected or prohibited by federal law. AB 1889, in view of Section 8(c) of the NLRA and its actual protection of speech rights of employers, invokes this strongest form of *Garmon* preemption, which dictates:

> When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by [the National Labor Relations Act,] due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law.

Garmon, 359 U.S. at 244, 79 S.Ct. 773 (quoted in *Sears,* 436 U.S. at 187, 98 S.Ct. 1745 n.11). AB 1889 encumbers federally protected speech rights, and in doing so, interferes with the jurisdiction of the National Labor Relations Board.

Congress has directed the National Labor Relations Board to oversee elections and determine what conduct constitutes an unfair labor practice under the Act. *See* 29 U.S.C. § 158(a)(1). Broadly speaking, and consistent with section 8(c) of the National Labor Relations Act, the NLRB takes a

laissez faire approach to employee and employer speech, allowing passionate, partisan debate to proceed during a union organizing campaign. *See Trent Tube Co.*, 147 NLRB 538, 541 (1964). At the same time, the NLRB has jurisdiction to regulate a certain bandwidth of employer speech, to ensure compliance with § 8(c). *See Midland Nat'l Life Ins. Co.*, 263 NLRB 127, 133 (1982) ("[W]e will no[t] probe into the truth or falsity of the parties' campaign statements, and[ ] will not set elections aside on the basis of misleading campaign statements .... [But] we will continue to protect against other campaign conduct, such as threats, promises, or the like, which interferes with employee free choice."). For example, the NLRB has long enforced various "time, place, and manner" rules that bar certain types of campaign and speech activities in the vicinity of the polls or in the final hours before an election. *See Peerless Plywood Co.*, 107 NLRB 427, 429-30 (1953); *Milchem, Inc.*, 170 NLRB 362, 362-63 (1968). The NLRB has held that, consistent with § 8(c), employers may hold mandatory meetings with employees about union organizing efforts, *see Livingston Shirt Corp.*, 107 NLRB 400, 409 (1953), direct supervisors to informally discuss a representation campaign with employees, *see Stanley Oil Co.*, 213 NLRB 219, 225 (1974), and distribute anti-union literature to employees even when enforcing a no-solicitation rule to employees, *Beverly Enterprises-Hawaii*, 326 NLRB 335, 336 (1998).

The California statute regulates and discourages the same partisan employer speech that Congress committed to the jurisdiction of the National Labor Relations Board. In doing so, AB 1889 discourages employer speech, which works at cross-purposes with the relaxed election speech rules as established by the NLRB. It was to the NLRB that Congress "entrusted ··· a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees." *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330, 67 S.Ct. 324, 91 L.Ed. 322 (1946). By discouraging employer speech,

California directly usurps the ability of the National Labor Relations Board to administer elections that will foster fair and free employee choice.

Far from hewing to the NLRA's goal of installing a "national labor policy of minimizing industrial strife," *Emporium Capwell Co. v. W. Addition Cmty. Org.*, 420 U.S. 50, 62, 95 S.Ct. 977, 43 L.Ed.2d 12 (1975), AB 1889 encourages additional litigation by allowing unions and the California Attorney General to bring proceedings in state court to attack an employer who engages in the very partisan employer speech that the National Labor Relations Board protects.

California impairs employer speech on the merits of union organizing activity despite the NLRB's permissive policy on employer speech. California defies Congress's decision to "entrust[ ] to the Board alone" the criteria necessary to conduct a fair representation election. *NLRB v. Waterman S.S. Corp.*, 309 U.S. 206, 226, 60 S.Ct. 493, 84 L.Ed. 704 (1940).

We observe that " *Garmon* preemption is 'intended to preclude state interference with the National Labor Relations Board's interpretation and active enforcement of the integrated scheme of regulation established by the NLRA.'" *Alameda Newspapers, Inc. v. City of Oakland*, 95 F.3d 1406, 1412 (9th Cir.1996) (quoting *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 613, 106 S.Ct. 1395, 89 L.Ed.2d 616 (1986)); *see also Gould*, 475 U.S. at 286-87, 288-89, 106 S.Ct. 1057 (1986). California's displacement of the NLRA's free speech protections and its interference with the National Labor Relations Board render AB 1889 preempted under *Garmon*. In other words, *Garmon* preemption applies because AB 1889 "regulate[s] conduct so plainly within the central aim of federal regulation[that it] involves too great a danger of conflict between power asserted by Congress and requirements imposed by state

law," thus creating a "potential frustration of national purposes." *Garmon,* 359 U.S. at 244, 79 S.Ct. 773.

B

The doctrine of "*Machinists* pre-emption preserves Congress' intentional balance between the uncontrolled power of management and labor to further their respective interests." *Bldg. and Constr. Trades Council of the Metro. Dist. v. Associated Builders and Contractors of Massachusetts/Rhode Island, Inc.,* 507 U.S. 218, 226, 113 S.Ct. 1190, 122 L.Ed.2d 565 (1993) ("*Boston Harbor*") (internal quotation marks omitted). Although cast nominally as an effort to ensure state neutrality, the California statute, by discouraging employers from exercising their protected speech rights, operates to significantly empower labor unions as against employers. In doing so, the California statute runs roughshod over the delicate balance between labor unions and employers as mandated by Congress through the National Labor Relations Act. For this reason, AB 1889 is preempted by the National Labor Relations Act, pursuant to *Machinists v. Wisconsin Employment Relations Commission,* 427 U.S. 132, 96 S.Ct. 2548, 49 L.Ed.2d 396 (1976).

Machinists preemption "is based on the premise that 'the use of economic pressure by the parties to a labor dispute is . . . part and parcel of the process of collective bargaining,' "which means that "neither a state nor the National Labor Relations Board is 'afforded flexibility in picking and choosing which economic devices of labor and management shall be branded unlawful.'" *Alameda,* 95 F.3d at 1413 (quoting *Machinists,* 427 U.S. at 144, 149, 96 S.Ct. 2548).

Under the doctrine of *Machinists* preemption, a state cannot "deny[ ] one party . . . a weapon that Congress meant him to have available," because such a state regulation "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Machinists,* 427 U.S. at 150, 151, 96 S.Ct. 2548 (internal quotation marks omitted).

Preemption will prevail over the application of local law even when federal law does not expressly protect the conduct at issue if "the application of state law . . . would operate to frustrate the purpose of the federal legislation." *Teamsters v. Morton,* 377 U.S. 252, 258, 260, 84 S.Ct. 1253, 12 L.Ed.2d 280 (1964) (noting also that a conflicting state law cannot be permitted to "frustrate the congressional determination to leave th[e] weapon of self-help available, and to upset the balance of power between labor and management expressed in our national labor policy."). *Machinists* affirms this notion, holding that "a particular activity might be protected by federal law not only when it [is explicitly protected by the NLRA], but also when it was an activity that Congress intended to be unrestricted by [a]ny governmental power to regulate." 427 U.S. at 141, 96 S.Ct. 2548 (internal quotation marks omitted). We are dealing not with an activity one speculates that Congress might protect, but rather, employer speech that Congress has explicitly protected.

Drawing upon our conclusions and observations in Part I, *supra,* we conclude that AB 1889 alters the balance of power between labor unions and employers and thus falls prey to *Machinists* preemption. In infringing the speech rights of employers, the statute substantively regulates and disrupts "Congress' intentional balance between the uncontrolled power of management and labor to further their respective interests." *Boston Harbor,* 507 U.S. at 226, 113 S.Ct. 1190 (internal quotation marks omitted). The statute frustrates "effective implementation of the [National Labor Relations] Act's processes," rendering preemption of the California statute under *Machinists* appropriate. *Machinists,* 427 U.S. at 148, 96 S.Ct. 2548 (internal quotation marks omitted). An essential structural component of the union organizing process as established by the National Labor Relations Act is the ability of management to communicate its views on the merits of unionism, an attribute that AB 1889 disrupts.

C

After we filed our first opinion, now withdrawn, appellant-intervenor AFL-CIO argued that we should consider preempting the penalty and enforcement provisions, but leave the core spending prohibition of AB 1889 intact. *See Dalton v. Little Rock Family Planning Servs.*, 516 U.S. 474, 476, 116 S.Ct. 1063, 134 L.Ed.2d 115 (1996) (internal quotation marks omitted) ("In a pre-emption case such as this, state law is displaced only to the extent that it actually conflicts with federal law."). We conclude that partial preemption is not proper, because our *Garmon* and *Machinists* analyses demand preemption of AB 1889's core spending restrictions.

The AFL-CIO argues that "[t]he core restrictions on spending state funds can operate independently of the penalty and private enforcement provisions, for the Attorney General would still have authority to enforce those restrictions like any other grant or contract terms." AFL-CIO Pet. for Rehearing at 16. In other words, under the AFL-CIO's vision as to how the statute could be severed[8] and saved from preemption, employers would still be required to avoid spending state funds on union organizing, and the Attorney General alone would be able to enforce the spending restrictions.

Of course, *someone* would be empowered to enforce even the most generic requirement that state funds not be spent on discouraging union organization. This fact, along with the AFL-CIO's argument that the Attorney General would still be able to enforce the statute, actually underscores the reasoning underlying our holding that the statutory provisions at issue are completely preempted. No matter

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[8] We need not decide whether the statutory provisions of AB 1889 are severable in the first instance, because even if certain provisions of the statute are severable, none of the statutory provisions before us survives our preemption analyses.

whether the Attorney General or the unions initiate the enforcement proceedings, the balance of power as between labor unions and employers would still be improperly disturbed. Even under the limited version of AB 1889 that the AFL-CIO proposes, any time an employer who receives state funds speaks about the merits of union organizing, it would risk being accused of misspending state funds and could be subjected to an investigation by the Attorney General or a lawsuit brought by the Attorney General. And as they have already done, the unions would still be empowered to press the Attorney General to investigate alleged claims of misuse of state funds, thus further deterring employer free speech about union organizing. In addition, employers who engage in union organizing-related speech would need to maintain records showing that it did not spend state funds on such activity. This need to keep records would dissuade some employers from engaging in union-related speech at all. These substantial disincentives to employer speech of even a limited version of AB 1889 would disrupt the federally imposed balance of power between labor unions and employers and interfere with the speech rules as enforced by the National Labor Relations Board.

We also note that severing the private enforcement provisions of AB 1889 will not successfully prevent labor unions from suing, under California law, to enforce a core restriction on the use of state funds. The union in the Crispino case, for example, based a cause of action in its lawsuit that did not rely on AB 1889's private enforcement provision. The union alleged that Crispino's misuse of state funds gave the union a cause of action for injunctive relief and restitutionary relief on behalf of the State of California. The union justified the cause of action by casting the alleged misuse of funds as a per se violation of California Business and Professions Code § 17200, as an "unlawful or unfair business act or practice." *See* Cal. Bus. & Prof.Code § 17204 (authorizing a civil action for an alleged violation of

Cal. Bus. & Prof.Code § 17200 "by any person who has suffered injury in fact and has lost money or property as a result").

We emphasize that AB 1889 is a regulatory enactment and a non-neutral one at that, benefitting labor unions as against employers. The statute's total preemption in no way hinges on the statute's enforcement and penalty provisions. Even if we were to delete the private enforcement provisions, the penalty provisions, and the commingling trap, still remaining at the very least is the problematic core of the statute. The core of AB 1889 places employers who receive state funds at risk of violating state law when they attempt to express their views about union organizing. The very core of AB 1889 interferes with an employer's protected federal right to express its views on union organizing, rendering *Garmon* and *Machinists* preemption appropriate.[9]

IV

AB 1889 is a regulatory measure subject to preemption analysis and we conclude that the California statute is not saved from preemption by asserted local interests. We reject appellants' argument that the statute should be saved from preemption because California is simply attempting to control the use of its own funds.

A

California and the AFL-CIO argue that AB 1889 is not subject to preemption because the statute is not regulatory in character, but instead these parties consider the state to be a mere "market participant." *See Alameda Newspapers Inc. v.*

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[9] The substantial record before us has been generated over the course of three years of litigation. In addition to the substantial documentation that was generated before the district court, along with the district court's well-reasoned decision, we have the benefit of at least ten appellate briefs from at least five different parties, not to mention a previous opinion of our own, all of which sufficiently informs our holding that AB 1889 is preempted in its entirety. We conclude that a remand is not necessary.

City of Oakland, 95 F.3d 1406, 1413 (9th Cir.1996) ("A prerequisite to preemption [under the NLRA] is a finding that the state or local action in question constitutes *regulation* of labor relations between employers and employees."). We conclude that AB 1889 is regulatory and that the market participant exception to NLRA preemption does not apply.

Boston Harbor is the seminal case outlining the market participant exception to preemption under the National Labor Relations Act. 507 U.S. 218, 113 S.Ct. 1190, 122 L.Ed.2d 565 (1993). *Boston Harbor* holds that a state agency acted as a market participant when it required contractors working on a clean-up of the Boston Harbor to agree to the terms of a project labor agreement. The Court notes that the agency's actions were proprietary, not regulatory and explains that the agency's actions were taken with respect to this "one particular job," in an effort to "ensure an efficient project that would be completed as quickly and effectively as possible at the lowest cost." *Id.* at 232, 113 S.Ct. 1190.

By contrast, *Wisconsin Department of Industry, Labor, and Human Relations v. Gould,* 475 U.S. 282, 106 S.Ct. 1057, 89 L.Ed.2d 223 (1986), strikes down a Wisconsin statute that barred recurring labor law violators from doing business with the state. Wisconsin argued that its statute should escape preemption because it acted through its spending power rather than its regulatory power. The Court found this to be a "distinction without a difference." *Gould,* 475 U.S. at 287, 106 S.Ct. 1057. Wisconsin was not acting as a market participant, the Court held, because Wisconsin "simply is not functioning as a private purchaser of services." *Id.* at 289, 106 S.Ct. 1057 (internal quotations omitted). The Court held the statute to be "tantamount to regulation." *Id.* at 289, 106 S.Ct. 1057. The Court explained that it "cannot believe that Congress intended to allow States to interfere with the 'interrelated federal scheme of law, remedy, and administration' under the NLRA as long as they did so through exercises of the spending power." *Id.* at 290, 106 S.Ct. 1057 (quoting *Garmon,* 359 U.S. at 243, 79 S.Ct.

773) (citation omitted); *see also id.* (noting that because "government occupies a unique position of power in our society, [ ] its conduct, *regardless of form,* is rightly subject to special restraints") (emphasis added). Because California through AB 1889 seeks to shape the overall labor market in a pervasive, nonproprietary manner, the statute is regulatory, and far removed from the market participant exception. *See Cardinal Towing & Auto Repair, Inc. v. City of Bedford,* 180 F.3d 686, 693 (5th Cir.1999) (concluding that to establish the market participant exception, the challenged action must "essentially reflect the entity's own interest in its efficient procurement of needed goods and services, as measured by comparison with the typical behavior of private parties in similar circumstances" and must have a "narrow scope ··· [to] defeat an inference that its primary goal was to encourage a general policy rather than address a specific proprietary problem.").

The statute applies broadly to employers and grantees who accept state funds, across countless industries, employers, and grantees. The statute is not tailored to govern in any particular setting. Further, the statute, similar to that at issue in *Gould,* is not focused on California's proprietary interest in efficiently procuring goods and services, but instead seeks to broadly color the state's impact on labor relations between employees and prospective labor union representatives. The statute sweeps broadly in impacting the labor relations of grantees and employers who enter contracts for furnishing goods or services to be paid for by the state treasury. We conclude that AB 1889 is a regulatory measure and thus does not elude NLRA preemption through the market participant exception.

B

It is for many of the same reasons that we cannot accept the AFL-CIO's argument that AB 1889 falls under the local-interest exception to *Garmon* preemption. The local-interest exception exempts from preemption state regulation of

activity that "touche[s] interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act." *Garmon,* 359 U.S. at 244, 79 S.Ct. 773. *See also Sears,* 436 U.S. at 188 n. 13, 98 S.Ct. 1745 (outlining several exceptions to *Garmon* preemption). Regulating employer speech in the labor relations context, which we hold that AB 1889 does, is not a traditional state interest, nor is it "so deeply rooted in local feeling and responsibility" as to invoke the exception.

This local-interest exception encompasses "the traditional law of torts, [ ] conduct marked by violence and imminent threats to the public order." *Garmon,* 359 U.S. at 247, 79 S.Ct. 773. The Supreme Court explained that in these instances, our system of federalism and the "compelling state interest . . . in the maintenance of domestic peace is not overridden in the absence of clearly expressed congressional direction." *Id.* The Supreme Court has also allowed states to adjudicate tort claims involving malicious libel that causes damage pursuant to this exception. *Linn,* 383 U.S. at 62, 86 S.Ct. 657.

The California statute neither addresses tort claims such as those involving libel or defamation, nor relates to violent conduct or threats to public tranquility. Appellants cite no authority demonstrating that the Supreme Court has applied this exception to *Garmon* preemption simply because the state's spending power is invoked as the tool for the state's regulation.

Appellants elevate the statute's use of state funds to talismanic status, as if the employment of state funds forgives the statute's interference with the federal National Labor Relations Act. We do not agree. The Court in *Gould* rejected precisely the argument that a state's use of its spending power is sufficient to save it from preemption. In *Gould,* the Court held that the Wisconsin statute was preempted, even though the state's spending power was at

issue. 475 U.S. at 287, 106 S.Ct. 1057. Emphasizing that Congress would not have intended to allow a state to overtake the statutory scheme of the NLRA simply because the state was using its spending power, *Gould* noted that "it is far from unusual for federal law to prohibit states from making spending decisions in ways that are permissible for private parties." *Id.* at 290, 106 S.Ct. 1057. The question of federal preemption does not ask us to "balance" state and federal interests, but rather, to determine whether Congress intended to preempt conflicting state law pursuant to the Supremacy Clause of the United States Constitution. *See* U.S. Const. art. VI.; *Metropolitan Life,* 471 U.S. at 747, 105 S.Ct. 2380.

Gould holds out hope that "some state spending policies" might invoke the local interest-exception, such as those which involve "exercises of the police power" or those that can "plausibly be defended as a legitimate response to state procurement constraints or to local economic needs." *Id.* at 291, 106 S.Ct. 1057. AB 1889 does not call into play the police power, state procurement constraints, or local economic needs. The statute is a simple, straightforward attempt to deter employers from communicating its views in labor relations matters. As such, it is not saved from preemption by the local-interest exception.

We hold that neither the market participant exception nor the local-interest exception to preemption applies.

V

California and the AFL-CIO argue that preemption should not apply because they cast the challenge to the statute as a facial, rather than an as-applied, challenge. Second, California and the AFL-CIO point to First Amendment doctrines and permissible limitations on Federal Grant Programs in arguing that the statutes should not be preempted. We address each argument in turn and conclude that none of these principles prevents preemption.

A

The AFL-CIO argues that this appeal is a facial, rather than an as-applied, challenge, and on this basis argue that plaintiffs must "establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987). The Chamber of Commerce contends that this case presents an as-applied challenge, because the question is whether the statute is invalid as to all employers covered by the NLRA. We hold that the categorical nature of NLRA preemption renders this debate (as to whether the challenge to an allegedly preempted statute is facial) an inconsequential one.

Appellants cite no NLRA preemption cases where a court has applied the *Salerno* standard. The absence of such cases is for good reason. The threshold question with regard to the doctrine of *Machinists* preemption does not address whether a state law's application to a particular set of facts is permissible, but rather, whether the state has impermissibly regulated in a zone that Congress has intended to be "free from all regulations." *Boston Harbor*, 507 U.S. at 226, 113 S.Ct. 1190. Similarly, in *Garmon*, the Court emphasized that our concern lies "with delimiting areas of potential conflict; potential conflict of rules of law, of remedy, and of administration." 359 U.S. at 242, 79 S.Ct. 773. We are "preclude[d]" from conducting "an ad hoc inquiry" as to the effects of state regulation in a particular factual situation, because "[o]ur task is confined to dealing with classes of situations." *Id.* In other words, we take a categorical, not a piecemeal, approach to NLRA preemption.

The categorical approach to NLRA preemption precludes the prospect of finding some circumstances in which a statute is preempted and others where it survives. The all-or-nothing stakes of NLRA preemption renders the inquiry under *Salerno* moot, because once preemption is called for, the categorical nature of this conclusion automatically

commands that "no set of circumstances exists under which the [statute] would be valid." *Salerno,* 481 U.S. at 745, 107 S.Ct. 2095. We hold that our preemption analysis by definition slices through the *Salerno* standard, and any dispute as to whether plaintiffs' challenge to the statute is facial is moot and need not be decided.

B

Appellants draw upon First Amendment jurisprudence, first noting that a legislature's refusal to subsidize protected speech does not offend the First Amendment, and then suggesting that AB 1889 be subject to a traditional First Amendment analysis. Among other cases, they point to *Rust v. Sullivan,* 500 U.S. 173, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991), where the Supreme Court held that the federal government does not violate the First Amendment by prohibiting the use of federal funds in programs in which abortion is a method of family planning. *See also Lyng v. Automobile Workers,* 485 U.S. 360, 108 S.Ct. 1184, 99 L.Ed.2d 380 (1988); *Regan v. Taxation with Representation,* 461 U.S. 540, 103 S.Ct. 1997, 76 L.Ed.2d 129 (1983).

The question before us, however, is not whether AB 1889 is consistent with the First Amendment. The operative question before us *is whether the California statute is preempted by federal labor law.* As we have explained, the detailed doctrines of *Garmon* and *Machinists* preemption have emerged to test whether a given enactment is preempted by the National Labor Relations Act. We find no basis to cast aside well-established preemption lines of analysis in favor of a doctrine grafted from cases that involve pure federal Constitutional challenges.

Even if AB 1889 would pass muster under the First Amendment, the question remains whether AB 1889 survives under the Supremacy Clause of the United States Constitution. *See* U.S. Const. art. VI. That, of course, is the ultimate inquiry of the preemption analysis: Whether federal law, as established in the National Labor Relations Act,

preempts AB 1889. We apply the appropriate doctrines of preemption, answer in the affirmative, and that ends the matter. *See* Part III, *supra.* Appellants' proffered First Amendment cases (like *Rust v. Sullivan)* have no relevance to our Supremacy Clause-related inquiry.

C

Appellants rely on several *federal* statutes that limit employers' use of specific *federal* grant or program funds to advocate for or against union organizing. *See* Workforce Investment Act, 29 U.S.C. § 2931(b)(7)(providing that "[e]ach recipient of funds . . . shall provide to the Secretary assurances that none of such funds will be used to assist, promote, or deter union organizing."); National and Community Service State Grant Program, 42 U.S.C. § 12634(b)(1) ("Assistance provided under this subchapter shall not be used by program participants and program staff to ··· assist, promote, or deter union organizing"). These statutes are similarly unavailing in altering our inquiry under the Supremacy Clause.

Federal preemption principles do not apply to possible conflicts between two federal statutes. *Chao v. Bremerton Metal Trades Council, AFL-CIO,* 294 F.3d 1114, 1119 (9th Cir.2002). Congress has the authority to impose certain restrictions where it sees fit. Further, the federal statutes at issue apply to only a few discrete areas of federal spending and are narrow in scope. These federal statutes are far removed from allowing us to infer an overriding congressional intent to permit the State of California to intrude into the union organizing process, and the nationwide operation of the National Labor Relations Act, through AB 1889.

VI

We hold that Section 8(c) of the National Labor Relations Act explicitly protects the free speech rights of employers in the labor relations context and conclude that the National Labor Relations Act, and the accompanying doctrines of

Garmon and *Machinists* preemption, completely preempt the California statutory provisions at issue with respect to any employer who is subject to regulation by the National Labor Relations Act.

AFFIRMED.

FISHER, Circuit Judge, dissenting:

This case requires us to balance two important governmental interests: the ability of states to control the use of their own funds, and the federal government's national labor policy. The majority's critical error is in failing to recognize our responsibility to honor both of these interests to the extent possible-instead, it gives short shrift to California's sovereignty interests through an overbroad application of federal labor preemption doctrine that conflicts with both our past precedent and that of the Supreme Court. The majority's preemption analysis subverts important federalism principles, and therefore I must respectfully dissent.

I agree with many—although not all—of the majority's characterizations of the complex labor preemption doctrine upon which this case turns. My main difference is in how I answer the question upon which the fate of AB 1889 turns: if a state allows employers to spend their *own* funds, in whatever manner they please, to advocate for or against unionization, does national labor preemption doctrine require the full preemption of a restriction on the use by employers of *state funds alone* for such purposes? I think not. As the Supreme Court has recognized, the State of California has the right to restrict the use of its own funds; and a more nuanced application of labor preemption law reveals that although certain parts of the statute may be preempted, its core restriction should survive.

"We are reluctant to infer preemption," *Bldg. & Constr. Trades Council of the Metro. Dist. v. Associated Builders & Contractors of Mass./R.I., Inc.*, 507 U.S. 218, 224, 113 S.Ct. 1190, 122 L.Ed.2d 565 (1993) ("*Boston Harbor*"), and any

analysis of preemption begins with the "basic assumption that Congress did not intend to displace state law." *Maryland v. Louisiana*, 451 U.S. 725, 746, 101 S.Ct. 2114, 68 L.Ed.2d 576 (1981). The majority concludes that AB 1889 is wholly preempted under both the *Garmon* and *Machinists* strands of labor preemption doctrine, so I will separately explain why neither conclusion is correct. *See San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959); *Lodge 76, International Association of Machinists & Aerospace Workers v. Wisconsin Employment Relations Commission*, 427 U.S. 132, 96 S.Ct. 2548, 49 L.Ed.2d 396 (1976) (" *Machinists* "). However, although the two doctrines require different analyses, the majority misses a fundamental truth that explains why neither doctrine requires the preemption of AB 1889. As the Supreme Court has explained in a related context, and as logic dictates, when a state restricts merely the use of state funds for a given activity—without regulating an employer's ability to pursue that activity with its own funds—the state is not directly regulating that activity. Because both the *Garmon* and *Machinists* preemption doctrines share a predicate inquiry into what activity is being regulated, the fact-ignored by the majority-that California is not actually regulating the speech at issue precludes full preemption under either doctrine.

I. AB 1889 Is Not Preempted Under Garmon

Garmon preemption arises when there is an actual or potential conflict between state regulation and federal labor law-when a state regulates activity that is actually or arguably protected or prohibited by the NLRA. *Garmon*, 359 U.S. at 244, 79 S.Ct. 773. The majority concludes that AB 1889 is preempted because it regulates activity that is actually protected by the NLRA.

First, employer union-related speech is not *actually protected* by the NLRA, but rather protected by the First Amendment, and therefore simply left *unregulated* by the

NLRA. AB 1889 is therefore properly analyzed under the *Machinists* strand of labor preemption doctrine. Second, AB 1889 does not actually regulate such activity in any case. Third, were I wrong about both of these conclusions, AB 1889 would still not be preempted under *Garmon*.

A. *The NLRA Does Not "Actually Protect" Employer Speech*

The majority concludes that the NLRA actually protects employer free speech rights-that it affirmatively grants protection to employers' speech on unionization. An examination of the structure and text of the NLRA demonstrates that the majority has misread it.

Section 7 of the Act is entitled "Right of employees as to organization, collective bargaining, etc." 29 U.S.C. § 157. It identifies areas of protected employee conduct, and can fairly be characterized as setting forth those employee practices that are actually protected by the NLRA. Section 8, conversely, is entitled "Unfair Labor Practices." 29 U.S.C. § 158. By its plain terms, it sets forth activities that are actually prohibited by the NLRA. It is easy to see how both Sections 7 and 8, then, can be implicated in a *Garmon* preemption analysis: if a state regulates employee activities that are actually protected under Section 7, or activities by either employers or labor unions that are actually prohibited under Section 8, that regulation will be preempted.

The majority, however, has a novel view of Section 8's third subsection, which is entitled "Expression of views without threat of reprisal or force or promise of benefit." 29 U.S.C. § 158(c). This subsection has been termed the "free speech" exemption to Section 8's definition of unfair labor practices, because it carves out noncoercive speech from the category of actually prohibited activity. From this statutory structure, the majority concludes, "[w]e hold that Section 8(c) of the [NLRA] . . . explicitly protects the right of employers to express their views about unions and union organizing efforts." Maj. Op. at 12185. This is simply

wrong, explaining why this circuit has never so held, requiring the majority to do it now, so late in the day. *See, e.g., Hotel Employees, Restaurant Employees Union, Local 2 v. Marriott Corporation,* 961 F.2d 1464, 1470 n. 9 (9th Cir.1992) ("[S]ection 8(c) merely states an employer does not commit an unfair labor practice by expressing its views regarding unionization."); *UAW-Labor & Employment & Training Corp. v. Chao,* 325 F.3d 360, 364-65 (D.C.Cir.2003) ("Fitting a *Garmon* claim under the language of § 8(c) is awkward .... [T]he activities described in § 8(c) ... are not 'protected *by*' the NLRA, except from the NLRA itself.") (emphasis in original).

The majority sets forth no textually grounded explanation for its conclusion that one section of the Act, entitled "Unfair Labor Practices," actually grants an affirmative right, and instead offers only misleading quotations from legislative history and caselaw. Again and again, the majority cites references to employers' "right of free speech." *See, e.g.,* Maj. Op. at 982. But there is no mystery about the actual source of this right. It is the First Amendment. When Congress passed the NLRA and set forth a list of prohibited actions, it saw fit to clarify that noncoercive speech-the sort protected by the First Amendment-did not constitute an unfair labor practice. Indeed, without such a qualifier, the constitutionality of the NLRA might well have been at issue.[10] The majority's authorities never go any further than explaining that employer speech is a necessary part of healthy labor relations. The majority seeks to use these broad platitudes to support its illogical reading of the NLRA,

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[10] Amicus curiae the National Labor Relations Board ("NLRB")-the very entity whose primary jurisdiction over labor related issues is protected by *Garmon*-makes no such claim as to 8(c)'s supposed affirmative grant of speech rights. *See NLRB Amicus Brief* at 4, 21-26 (echoing interpretation of the Act offered above, and noting Section 8(c)'s "exemption" for noncoercive speech).

in order to identify an "actually protected right" in the Act itself.

This is not to say that there is no preemption issue here-it is just that it is best understood as a *Machinists* issue, not a *Garmon* issue. As I shall illustrate below, *Machinists* preemption is the more appropriate doctrine under which to evaluate AB 1889, because the arguable impermissible effects of AB 1889 are on activities meant to be left *unregulated* by the NLRA, not because of any direct conflict with the protections and prohibitions of the Act.[11]

B. *Even If AB 1889 Arguably Protects Employer Speech Rights, Garmon Preemption is Inappropriate*

It should be clear that Section 8(c) does not definitely protect employer speech rights; even if one were to disagree with my reading of the NLRA, one would have to grant that these two alternative readings present an unresolved conflict in our circuit. Let us assume, then, that AB 1889 *arguably* protects employer speech rights. Nonetheless, Supreme Court precedent shows that *Garmon* preemption is not appropriate here.

1. *The Local Interest Exception*

The Supreme Court has cautioned that "inflexible application of [the *Garmon*] doctrine is to be avoided, especially where the State has a substantial interest in regulation of the conduct at issue and the State's interest is one that does not threaten undue interference with the federal regulatory scheme." *Farmer v. United Bhd. of Carpenters & Joiners*, 430 U.S. 290, 302, 97 S.Ct. 1056, 51 L.Ed.2d 338 (1977). When conducting a *Garmon* preemption inquiry into whether regulation overlaps with NLRB jurisdiction, we

[11] Even if one were to disagree with my reading of Section 8(c), I explain below in the *Machinists* analysis how AB 1889 does not directly regulate employer speech in any case-meaning that even if Section 8(c) *did* grant employer speech rights, AB 1889 would not be preempted under *Garmon* because it does not regulate such speech. *See infra* Section II.

must therefore conduct "a balanced inquiry into such factors as the nature of the federal and state interests in regulation and the potential for interference with federal regulation." *Id.* at 300, 97 S.Ct. 1056. This is to avoid preempting state regulation of conduct that involves "interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we [cannot] infer that Congress ha[s] deprived the States of the power to act," or where "the activity regulated [is] a merely peripheral concern" of the NLRA. *Garmon,* 359 U.S. at 243-44, 79 S.Ct. 773; *see Belknap, Inc. v. Hale,* 463 U.S. 491, 498, 103 S.Ct. 3172, 77 L.Ed.2d 798 (1983).

The previously recognized exceptions to *Garmon* preemption have involved exercises of state court jurisdiction over universally recognized common law torts, rather than, as here, the exercise of a state's spending power. *See, e.g., Linn v. United Plant Guard Workers of America,* 383 U.S. 53, 62, 86 S.Ct. 657, 15 L.Ed.2d 582 (1966) ("[A] State's concern with redressing malicious libel is 'so deeply rooted in local feeling and responsibility' that it is not preempted despite arguable overlapping NLRB jurisdiction over the speech at issue.") (quoting *Garmon,* 359 U.S. at 244, 79 S.Ct. 773). But the logic that compelled the Supreme Court to recognize the exception in the former category applies just as powerfully-if not more so-to local spending decisions. A state's control of its own purse strings is of at least as great concern to it as its power to regulate defamatory speech or trespassing. Just as the state has a responsibility to protect its citizens from such torts, so it has a responsibility and a right to spend its treasury-largely generated from the pockets of its citizens-based on principles and guidelines that the democratically elected legislature of that state deems to be appropriate. Such spending decisions are, of course, subject to federal supremacy concerns. But the Supreme Court has commanded us to be extremely cautious before concluding that a federal regulatory scheme

is meant to intrude upon such a fundamental state prerogative.

The majority gets the denominator wrong when it concludes that "regulating employer speech in the labor relations context . . . is not a traditional state interest, nor is it 'so deeply rooted in local feeling and responsibility' as to invoke the exception." Maj. Op. at 992. The majority ignores the broader state interest at issue-control over its own fisc-and inappropriately second-guesses the California legislature's motivations in exercising this prerogative. In an era of tightening budgets, where many important competing interests vie for every dollar of a state's treasury, it is all the more important that states retain their right to determine the best way to allocate their scarce resources. Today, the majority effectively forces California to fund employers' union-related expression with those scarce dollars.

2. *The Supreme Court's Refinement of Garmon in Sears*

In *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 98 S.Ct. 1745, 56 L.Ed.2d 209 (1978), the Supreme Court refined its *Garmon* preemption doctrine in the context of an employer's common law trespassing suit against picketing union members where the picketing was "arguably-but not definitely-prohibited or protected by federal law." *Sears*, 436 U.S. at 182, 98 S.Ct. 1745. *Sears* divided the inquiry into two related but distinct questions: whether the state court's jurisdiction over the trespassing claim was preempted (1) by the arguably *prohibited* nature of the picketing, or (2) by its arguably *protected* nature.

As to whether the union's picketing was arguably prohibited by the NLRA, *Sears* articulated a relatively straightforward "primary jurisdiction" test: if the claim considered by the state tribunal is identical to one that could be presented to the NLRB, the state's jurisdiction is preempted. *Id.* at 197, 201, 98 S.Ct. 1745; *see also Belknap*, 463 U.S. at 511, 103 S.Ct. 3172 (applying primary

jurisdiction test to state regulation of arguably prohibited conduct). As to whether the picketing was arguably protected by the NLRA, the Court went beyond the primary jurisdiction test to address additional federal supremacy concerns-whether, despite the lack of identicality between issues the state court and NLRB might consider, preemption was warranted to protect against the risk of "misinterpretation of [the NLRA] and the consequent prohibition of protected conduct." *Sears*, 436 U.S. at 203, 98 S.Ct. 1745. We employed this "primary jurisdiction plus" approach in *Radcliffe v. Rainbow Const. Co.*, 254 F.3d 772, 786 (9th Cir.2001) (holding that state jurisdiction over claims by union members against employer for false arrest, false imprisonment and malicious prosecution were not preempted under *Garmon*).[12]

a. *Primary Jurisdiction*

The parties do not dispute that the NLRB has no interest in resolving the central controversy that a state court would have to resolve in enforcing AB 1889-whether state funds were used to "assist, promote, or deter union organizing." The focus of a lawsuit under AB 1889 would not be on whether employer speech was proper or improper, but on whether state funds were used to support that speech. Far from being identical to the kind of question the NLRB might consider, a suit under the California statute would be an accounting for the employer's possible misuse of funds, with no attention at all to the nature of the advocacy itself.

The Chamber of Commerce makes two arguments in response. It first argues that a state court enforcing AB 1889 would in some instances have to determine whether a union was a "labor organization" under § 16647, an area that it claims is reserved to the NLRB under *Marine Engineers*

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[12] In *Radcliffe*, defendants argued that "the validity of plaintiffs' claims . . . turns on whether the union activities carried on by the plaintiffs were . . . protected by § 7 of the NLRA." *Id.* at 785.

Beneficial Ass'n v. Interlake Steamship Co., 370 U.S. 173, 82 S.Ct. 1237, 8 L.Ed.2d 418 (1962). But even if the state court had to make such a determination, it would be relevant only to the ultimate question of whether an employer spent state funds on advocacy, not whether the advocacy violated the NLRA. We have previously rejected an argument that the incidental determination by a state court of whether persons were engaged "in lawful union activity" was sufficient to create *Garmon* preemption, where the focus of a state proceeding was on "state concerns of accommodating such union activity with the state-law rights of private property." *Radcliffe*, 254 F.3d at 786. Moreover, AB 1889 is not comparable to the Minnesota statute at issue in *Marine Engineers*, under which a state law determination that certain groups were not labor organizations permitted the state court to regulate picketing and other activities identical to those that could have been raised before the NLRB. *Marine Engineers*, 370 U.S. at 176, 82 S.Ct. 1237.

The Chamber of Commerce also argues that because AB 1889 restricts an employer's ability to "influence" its employees using state funds, *see* § 16645(a), California courts would effectively be deciding whether employers had improperly acted under § 8(a) of the NLRA "to restrain or coerce employees in the exercise of the rights contained in [§ 7 of the NLRA]." 29 U.S.C. § 158(a) (NLRA § 8(a)). However, were the NLRB to consider an unfair labor practice charge arising from the employer's conduct, it would focus on whether the employer had interfered with the employees' § 7 rights, regardless of whether the employer used state funds in the process. Under AB 1889, the California court would be determining only whether an employer used state funds for any attempt whatsoever to influence employees, not whether that attempt violated the NLRA. Thus, because the statute is focused only on control

over the use of state funding, there is no identicality of claims, and the primary jurisdiction test is not met.[13]

b. *Additional Supremacy Concerns*

Because of the arguably protected character of the speech at issue, we would next assess whether the state statute is preempted because Congress would "prefer[ ] the costs inherent in a jurisdictional hiatus to the frustration of national labor policy which might accompany the exercise of state jurisdiction." *Sears*, 436 U.S. at 203, 98 S.Ct. 1745.

For essentially the same reasons detailed above in the primary jurisdiction analysis, the risk that a state court applying AB 1889 could "misinterpret [ ] . . . federal law," *id.*, is nonexistent in this case. Not only is there no identicality of claims, but the subject matter of an AB 1889 suit is so far removed from the NLRA's primary focus—the determination of what constitutes an unfair labor practice—that any rationale for *Garmon* preemption is absent.

Sears itself provides a strong analogy. The Court, after noting the state interest in hearing trespass claims, identified a clear potential overlap between the NLRB's jurisdiction and that of the state court: "[T]he state court was obligated to decide [whether] the trespass was not actually protected by federal law, a determination which might entail an accommodation of Sears' property rights and the Union's § 7 rights. In an unfair labor practice proceeding initiated by the Union, the Board might have been required to make the same accommodation." *Id.* at 201, 98 S.Ct. 1745. The Court further noted that the trespass at issue was arguably protected by the NLRA, whereas previously recognized exceptions to *Garmon* preemption did not "involve [ ] protected conduct."

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[13] There is no merit to the Chamber of Commerce's claim that the California statute provides an additional remedy for NLRA violations. The statute's damages provisions are intended to remedy the misuse of state funds under the statute, regardless of whether any NLRA violation has occurred.

Id. at 204, 98 S.Ct. 1745. Nevertheless, the Court concluded that the risk that regulation of trespass might impermissibly trench upon the NLRB's jurisdiction over the speech rights of union members was too unlikely to justify usurpation of the state's prerogative. There was no "significant risk of prohibition of protected conduct," so the Court was "unwilling to presume that Congress intended the arguably protected character of the [regulated] conduct to deprive the California courts of jurisdiction to entertain Sears' trespass action." *Id.* at 207, 98 S.Ct. 1745.

Here, I have noted the important state interest in determining how its funds are spent. Even if the exercise of this state prerogative could have some effect on the arguably protected advocacy rights of employers, given the nature and functioning of the statute-which has no concern for whether the speech at issue was protected by the NLRA, but only for where the money to fund it came from-there is no "significant risk of prohibition of protected conduct." *Id.* Indeed, the state interest is so strong that we cannot "presume that Congress intended the arguably protected character of the [regulated] conduct to deprive" California of the ability to control the use of its own funds in this manner. *Id.*

II. AB 1889 Is Not Wholly Preempted Under Machinists

Machinists preemption operates as a form of "labor field preemption"-it requires the preemption of any state regulation of activity that although not directly regulated by the NLRA, was intended by Congress "to be controlled by the free play of economic forces." *Machinists*, 427 U.S. at 140, 96 S.Ct. 2548 (internal quotation and citation omitted). AB 1889 is best viewed through this lens, because the employer expressive activity at issue is not protected or prohibited by the NLRA, but rather is an essential part of the NLRA's overall labor relations structure.

In enacting a restriction on the use of state funds with the purpose of remaining neutral in labor disputes, California has

not intruded on labor relations meant to be left unregulated by the states. The Supreme Court has specifically emphasized the legitimate governmental interest in remaining neutral in labor disputes. *See Lyng v. UAW*, 485 U.S. 360, 371-72, 108 S.Ct. 1184, 99 L.Ed.2d 380 (1988) (holding that a Congress' decision to avoid "subsidization" of striking workers through a food stamp program was legitimately based in Congress's "considered efforts to avoid favoritism in labor disputes"; noting that "we have little trouble in concluding that [the food stamp restriction] is rationally related to the legitimate government objective of avoiding undue favoritism to one side or the other in private labor disputes"). Indeed, state neutrality is not only consistent with the NLRA-it is in many cases *mandated* by the NLRA. Were a state to opt against neutrality by intervening on the side of employer or employee in a labor dispute, such an intervention could itself raise preemption problems. *See Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 619, 106 S.Ct. 1395, 89 L.Ed.2d 616 (1986) ("Even though agreement is sometimes impossible, government may not step in and be a party to the negotiations."). Thus, California's decision to avoid having its own funds used on either side of a labor conflict is clearly legitimate.[14]

Nor does the restriction on the use of state funds interfere with an employer's ability to engage in "self-help" in union organizing in the sense protected by *Machinists*. Restricting the use of the state's funds does not imply an attempt to alter an employer's private decision to support or oppose

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[14] The majority's extensive arguments as to the "real" purpose of AB 1889 are beside the point. Neutrality means not taking sides. Even if the majority is right that California is effectively preventing employers from using state funds to advocate *against* unionization only, California is still remaining neutral-and it is simply irrelevant whether the money would otherwise be spent to support unionization, oppose it, or in some combination.

unionization. An employer who wishes to oppose unionization using its own funds will not suffer any penalty in doing so. It is ironic that a doctrine meant to ensure that employers can engage in self-help is applied today to force government to help employers oppose unionization.

To be sure, under AB 1889 those employers in California who are currently receiving money from the state will be prevented from using those funds to speak about unionization. Because, according to the Chamber of Commerce, some employers are entirely funded by the state, under the statute some California employers may be prevented from spending any portion of their budgets to advocate during a labor dispute. However, such employers will be prevented from labor advocacy only because they have already chosen to fund their budgets entirely from the state-itself a business decision, and part of the free interaction of market forces that the NLRA is designed to protect.

It is implausible that Congress intended the *use* of state funds to be an area "unregulated because left to be controlled by the free play of economic forces"; state funds are by definition not controlled by the free play of economic forces. *Machinists,* 427 U.S. at 140, 96 S.Ct. 2548 (internal quotation marks omitted); *see also Boston Harbor,* 507 U.S. at 225-26, 113 S.Ct. 1190. States are not "employers" under the NLRA, and the congressional goal of balancing relations between private employers and employees does not apply to state governments. 29 U.S.C. § 152(2). Addressing only the use of state funds does not address employer behavior in the private marketplace, which is what the NLRA is designed to regulate. *See* Archibald Cox, *Labor Law Preemption Revisited,* 85 Harv. L.Rev. 1337, 1352 (1972) (cited with approval in *Machinists,* 427 U.S. at 140 n. 4, 96 S.Ct. 2548) ("Two fundamental ideas lie at the core of the national labor policy: (1) freedom of employee self-organization; and (2) the voluntary *private* adjustment of conflicts of interest over wages, hours, and other conditions of employment

through the negotiation and administration of collective bargaining agreements.") (emphasis added). Because the statute creates a wall between publically funded activity and private activity, it does not make sense to hold that the California statute has violated *Machinists* simply by restricting the use of state funds.

The majority's critical error is its conclusion that a state's restricting employers' use of the state's own funds for labor-related advocacy *must* require the conclusion that it is regulating the labor field. This leap of faith is not supported by precedent or logic, and can only be maintained through an unwarranted vision of the statute's meddling effect on labor relations. As to the health and vitality of the labor relations debate itself, there is no evidence in the record that AB 1889's core restriction will do anything to undermine it.

Here is an illustrative example. Imagine that California had a certain amount of money that it wished to grant to hospitals to create more nurse positions. However, California wanted the money to go toward creating nurse positions-not toward funding a campaign to convince the new nurses not to unionize. So long as the recipient hospitals are still free to lobby the nurses to whatever extent they please with their existing treasuries, why should California be forced to fund such lobbying with the money that the state wishes to go toward funding the positions themselves?

The majority, then, has a problem: it purports to rely on the statute's "leverag[ing]of state funds" alone as requiring preemption, Maj. Op. at 980 n. 6, but cannot demonstrate how such leveraging alone can have anything but a negligible and incidental effect (at worst) on employer/employee union-related debates. The majority deals with this problem in two ways. First, it relies on the Supreme Court's opinion in *Wisconsin Dept. of Industry, Labor and Human Relations v. Gould, Inc.*, 475 U.S. 282, 289, 106 S.Ct. 1057, 89 L.Ed.2d 223 (1986), for the

proposition that just because California "has chosen to use its spending power rather than its police power does not significantly lessen the inherent potential for conflict [with federal labor relations]." Second, it focuses on the statute's enforcement provisions as having an improper effect on employer speech.

A. *Gould, Rust and State Spending Power*

In *Gould,* the Supreme Court found preempted a statute that used a state's spending power to directly regulate labor relations. *Id.* at 291, 106 S.Ct. 1057. The statute held that a company found to have violated the NLRA three times within any five year period would be barred from doing any business with the state. In doing so, the statute made an employer's union-related conduct (in this case, whether or not it had violated the NLRA) a condition for the receipt of state funds. If an employer violated the statute, it could not receive the state funds (or, of course, spend them) for any purpose. *Id.* at 283-84, 106 S.Ct. 1057.

Likewise, in *Golden State,* the Court found preempted a city's decision to condition renewal of a cab franchise on settlement of a labor dispute. *Golden State,* 475 U.S. at 616-18, 106 S.Ct. 1395. Once again, the employer's labor-related activity (in this case, settling a labor dispute) was made a condition for the receipt of state funds. If the employer did not act in the labor arena in the way the city demanded, the employer could not receive the state funding (or franchise). In both cases, the Supreme Court concluded that such conditioning of funds constituted direct regulation of the activity at issue-and was therefore preempted.

If California had made employer neutrality a condition of the *receipt* of state grants or funds-that is, if it had made employer neutrality a condition of doing business with the state-I have little doubt that such a restriction would be preempted by the NLRA. As in *Gould* and *Golden State,* a condition on the receipt of funds would encourage employers to modify the spending of their private funds in labor

disputes in order to become eligible for state funding, and would therefore be a transparent effort to use the spending power to "introduce some standard of properly balanced bargaining power" and alter employers' private spending decisions. *Machinists,* 427 U.S. at 149-150, 96 S.Ct. 2548 (internal quotation marks and citation omitted).

The California statute at issue here has a crucial difference. A restriction on the *use* of state funds is different from a restriction imposed as a condition for the *receipt* of state funds. In the former instance, the employer has absolute freedom to spend its own funds however it wishes, so long as it does not spend state funds on its union-related advocacy; in the latter, the employer's use of its own funds is curtailed by the restriction. Preventing private employers from using state funds on pro- or anti-union activity does not, in and of itself, undermine the NLRA bargaining process protected by *Machinists.* Such a restriction affects that process only to the extent that it allows the state to maintain its own neutrality even as it funds private employers.

As such, the difference between the statutes at issue in *Gould* and *Golden State* and AB 1889 can be analogized to the circumstances of *Rust v. Sullivan,* 500 U.S. 173, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991), where the Supreme Court distinguished between statutes that impose conditions on the receipt of state funds from statutes that simply limit the uses to which those funds may be put. *Id.* at 198, 111 S.Ct. 1759. I agree with the majority that "the question before us . . . is not whether AB 1889 is consistent with the First Amendment." Maj. Op. at 994. However, *Rust* is about more than just the First Amendment. It also reveals the Supreme Court's understanding of what constitutes direct regulation through a state's spending power. The Court held in *Rust* that "[b]y requiring that the ··· grantee engage in abortion-related activity separately from activity receiving federal funding, Congress has ··· not denied it the right to engage in abortion-related activities." *Rust,* 500 U.S. at 198, 111 S.Ct. 1759. With these words, the Court signaled what

the majority misses today: such a restriction on the use of government funds is not direct regulation of the activity. Instead, "Congress has merely refused to fund such activities out of the public fisc." *Id.*

Likewise, here, California has not "denied" employers the "right to engage in [union]-related activity," but "merely refused to fund such activities out of the public fisc." *Id.* This conclusion operates independently of First Amendment doctrine: it simply follows from the Court's observations about what is regulation and what isn't. The issue in *Rust* was whether a statute was invalidated by the First Amendment; here, it is whether a statute is invalidated by federal labor preemption doctrine. These are different inquiries, but they share the same predicate inquiry into what activity is being regulated. In *Rust*, the Supreme Court offered guidance on this separate inquiry, and we should not ignore its obvious relevance here.

The Supreme Court was clear in *Gould* that "[n]o other purpose [than regulating labor relations] could credibly be ascribed [to the statute], given the rigid and undiscriminating manner in which [it] operates: firms adjudged to have violated the NLRA three times are automatically deprived of the opportunity to compete for the State's business." *Gould*, 475 U.S. at 287-88, 106 S.Ct. 1057. By contrast, AB 1889 is both flexible and discriminating: it *discriminates* between employers' use of their own funds, which is permitted, and of state funds, which is not; and it allows employers the *flexibility* to use their own funds for union-related advocacy. Further, a very different purpose could credibly be ascribed to it: to help the state remain neutral in labor disputes.

Rust's analysis of what kinds of exercises of the state spending power constitute direct regulation of activity is arguably controlling here. At the very least, it illustrates how the majority has misunderstood the nature of the regulation at issue.

B. *AB 1889's Enforcement Provisions*

The majority further argues that AB 1889's enforcement provisions have effects that require preemption. As I will explain, I agree with several of the majority's conclusions in this regard-but these conclusions provide no basis whatsoever for holding, as the majority has, that the restriction on the use of state funds is itself preempted.

My own analysis leads me to conclude that although AB 1889's core restriction survives preemption, several of its enforcement provisions may in their effect go beyond assuring California's neutrality in labor disputes and instead pressure employers themselves to remain neutral in labor disputes. The majority identifies these problems as well, arguing that "[b]y creating exacting compliance burdens, strict accounting requirements, the threat of lawsuits, and onerous penalties, the statute chills employer speech on the merits of unionism, and adds that" "[t]he potential cost of litigation, plus the threat of severe penalties threaten to effectively halt employer campaigns . . . " Maj. Op. at 978. The majority then details what it considers to be the evils of "the compliance provisions," the "documentation demands" and other enforcement provisions. Maj. Op. at 979.

In certain respects, I share the majority's concerns. Some of the statute's enforcement provisions appear to have an impermissibly intrusive effect on the NLRA's balance of private actions between employer and employee, by exposing employers to the risk of significant litigation costs and punitive sanctions if they support or oppose unionization, even without using state funds.

The majority, however, uses these intrusive effects, which derive solely from a few specific enforcement provisions, as a proxy for finding the entire statute preempted. The majority has held that the restriction on the use of state funds must be preempted, but only marshaled arguments against a narrower subset of the statute's provisions-those that implement and enforce the restriction.

C. *Dalton and Partial Preemption*

"In a pre-emption case such as this, state law is displaced only to the extent that it actually conflicts with federal law. . . . .The rule is that a federal court should not extend its invalidation of a statute further than necessary to dispose of the case before it." *Dalton v. Little Rock Family Planning Servs.*, 516 U.S. 474, 476, 116 S.Ct. 1063, 134 L.Ed.2d 115 (1996) (internal citations and quotation marks omitted). Thus, in order to resolve this case, we have an obligation to determine which parts of the statute are preempted and which are not.

The majority attempts to avoid this obligation by concluding that regardless of how the statute is enforced, "the balance of power as between labor unions and employers would still be improperly disturbed." Maj. Op. at 989. But how? The majority fails to establish that the restriction on use of state fund is itself preempted. Once one strips from the majority opinion all of its warnings about the effects of the enforcement provisions, there is nothing left to trigger preemption.

Instead, the majority is content to point to vague "risks"—the risk that employers will "be accused of misspending state funds" or "of violating state law."[15] Aside from the few enforcement provisions the majority and I agree upon, these generalized risks are not sufficiently concrete effects to warrant striking down a sovereign act of the state of California-as the Supreme Court has made clear in *Dalton* and before. *See Boston Harbor*, 507 U.S. at 224, 113 S.Ct. 1190 (cautioning us to be "reluctant to infer preemption"); *Maryland v. Louisiana*, 451 U.S. 725, 746, 101 S.Ct. 2114, 68 L.Ed.2d 576 (1981) (stating that we must begin any

[15] The majority also stresses that employers would suffer the indignity of "need[ing] to maintain [financial] records," something that should not be entirely unfamiliar to private entities that receive money from state coffers.

preemption analysis with the "basic assumption that Congress did not intend to displace state law.").

Because I believe only certain enforcement provisions sufficiently risk intrusion into areas preempted under *Machinists*, I would hold that only partial preemption is warranted. On the record before us, however, we are not in a position to determine with certainty which parts of AB 1889 must be found preempted. As made clear by the majority, both in the district court and before us, the parties limited their preemption arguments to discussion of the statute as a whole. It would not be appropriate for us on this record to try to divide the statute's enforcement provisions into preempted and nonpreempted portions. For example, certain enforcement provisions, such as the requirement that employers segregate state and nonstate funds, may be designed to do no more than permit the state to erect a "wall" between state and non-state funds and to enforce a purely compensatory remedy when state funds are misused. To conclude that such provisions are preempted could call into question a state's power to require routine record-keeping requirements that apply in many different contexts to nonprofit corporations and other recipients of state grants.

Even on this record, however, it seems likely that at least some of the enforcement provisions—particularly those that relate to record-keeping—should survive preemption. Therefore, we should leave it to the district court to resolve such questions in the first instance on an appropriate record. We should remand to the district court so the parties can present arguments (and evidence, if necessary) about the separate statutory provisions in light of the preemption principles I have explained today. *See, e.g., Arizona Libertarian Party, Inc. v. Bayless*, 351 F.3d 1277, 1283 (9th Cir.2003) ("Although severability is a question of state law that we review de novo, we nonetheless consider it prudent to remand to the district court where we believe the district court is better able to decide the question in the first instance.") (internal quotation marks and citations omitted).

For the reasons set forth above, I respectfully dissent.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 03-55166

CHAMBER OF COMMERCE OF THE UNITED STATES; CALIFORNIA CHAMBER OF COMMERCE; EMPLOYERS GROUP; CALIFORNIA HEALTHCARE ASSOCIATION; CALIFORNIA MANUFACTURERS AND TECHNOLOGY ASSN.; CALIFORNIA ASSOCIATION OF HEALTH FACILITIES; CALIFORNIA ASSOCIATION OF HOME & SERVICES FOR THE AGING; BETTEC CORPORATION; MARKSHERM CORPORATION; ZILACO INC., ZILACO; DEL RIO HEALTHCARE, INC.; BEVERLY HEALTH & REHABILITATION SERVICES, INC. DBA BEVERLY MANOR COSTA MESA; INTERNEXT GROUP,
Plaintiffs-Appellees,

CALIFORNIA LABOR FEDERATION, AFL-CIO; AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS,
Intervenors-Appellants,

v.

BILL LOCKYER, ATTORNEY GENERAL, IN HIS CAPACITY AS ATTORNEY GENERAL OF THE STATE OF CALIFORNIA; DEPARTMENT OF HEALTH SERVICES; FRANK G. VANACORE, AS THE CHIEF OF THE AUDIT REVIEW AND ANALYSIS SECTION OF THE CALIFORNIA DEPARTMENT OF HEALTH SERVICES; DIANA M. BONTA, R.N., DR., PH.D, AS THE DIRECTOR OF THE CALIFORNIA DEPARTMENT OF HEALTH SERVICES,
Defendants.

No. 03-55169

CHAMBER OF COMMERCE OF THE UNITED STATES; CALIFORNIA CHAMBER OF COMMERCE; EMPLOYERS GROUP; CALIFORNIA HEALTHCARE ASSOCIATION; CALIFORNIA MANUFACTURERS AND TECHNOLOGY ASSN.; CALIFORNIA ASSOCIATION OF HEALTH FACILITIES; CALIFORNIA ASSOCIATION OF HOME & SERVICES FOR THE AGING; BETTEC

CORPORATION; MARKSHERM CORPORATION; ZILACO INC., ZILACO; DEL RIO HEALTHCARE, INC.; BEVERLY HEALTH & REHABILITATION SERVICES, INC. DBA BEVERLY MANOR COSTA MESA; INTERNEXT GROUP,
Plaintiffs-Appellees,

and

CALIFORNIA LABOR FEDERATION, AFL-CIO; AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS,
Intervenors-Appellants,

v.

BILL LOCKYER, ATTORNEY GENERAL, IN HIS CAPACITY AS ATTORNEY GENERAL OF THE STATE OF CALIFORNIA; DEPARTMENT OF HEALTH SERVICES; FRANK G. VANACORE, AS THE CHIEF OF THE AUDIT REVIEW AND ANALYSIS SECTION OF THE CALIFORNIA DEPARTMENT OF HEALTH SERVICES; DIANA M. BONTA, R.N., DR., PH.D, AS THE DIRECTOR OF THE CALIFORNIA DEPARTMENT OF HEALTH SERVICES,
Defendants-Appellants.

Appeal from the United States District Court for the Central District of California Gary L. Taylor, District Judge, Presiding.

Filed April 20, 2004.

Before: BEEZER and FISHER, Circuit Judges, and ENGLAND, JR., District Judge.*

FISHER, Circuit Judge:

This case presents a convergence of two important governmental interests: the ability of states to control the uses of state funds and the federal government's national labor policy, expressed through the National Labor Relations

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* The Honorable Morrison C. England, Jr., United States District Judge for the Eastern District of California, sitting by designation.

Act ("NLRA"). The question is whether these two interests conflict here, such that the NLRA overrides California's interest. Specifically, a California statute forbids employers who receive state grants or funds in excess of $10,000 from using such funding to advocate against or in favor of union organizing. We are constrained to conclude that California-acting as a regulator, not a proprietor in imposing these restrictions-has acted in such a way as to undermine federal labor policy by altering Congress' design for the collective bargaining process. Therefore, we hold that the California statute as written is preempted by the NLRA under *Lodge 76, International Association of Machinists & Aerospace Workers v. Wisconsin Employment Relations Commission,* 427 U.S. 132, 96 S.Ct. 2548, 49 L.Ed.2d 396 (1976) ("*Machinists*").

FACTUAL AND PROCEDURAL BACKGROUND

On September 28, 2000, California enacted Assembly Bill No. 1889, Cal. Gov't Code § 16645-49.[1] The preamble of the statute declares:

It is the policy of the state not to interfere with an employee's choice about whether to join or to be represented by a labor union. For this reason, the state should not subsidize efforts by an employer to assist, promote, or deter union organizing. It is the intent of the Legislature in enacting this act to prohibit an employer from using state funds and facilities for the purpose of influencing employees to support or oppose unionization and to prohibit an employer from seeking to influence employees to support or oppose unionization while those employees are performing work on a state contract.

§ 16645, Historical and Statutory Notes, Section 1 of Stats.2000, c. 872.

[1] All citations to Cal. Gov't Code § 16645-49 are hereinafter cited as, *e.g.*, "section 16645."

Two provisions of the California statute are at issue on this appeal-sections 16645.2 and 16645.7. Section 16645.2(a) bars private employers who are "recipient[s] of a grant of state funds" from "us[ing] the funds to assist, promote, or deter union organizing." Section 16645.7(a) bars "[a] private employer receiving state funds in excess of [$10,000] in any calendar year on account of its participation in a state program" from using such funds "to assist, promote, or deter union organizing."

The phrase "assist, promote, or deter union organizing" includes "any attempt by an employer to influence the decision of its employees in this state or those of its subcontractors regarding . . . [w]hether to support or oppose a labor organization that represents or seeks to represent those employees . . . [or][w]hether to become a member of any labor organization." § 16645(a)(1)-(2). The statute specifies as prohibited "any expense, including legal and consulting fees and salaries of supervisors and employees, incurred for research for, or preparation, planning, or coordination of, or carrying out, an activity to assist, promote, or deter union organizing." § 16646(a). Expressly exempted from the statute's reach are "activit[ies] performed" or "expense[s] incurred" in connection with, *inter alia,* "[a]ddressing a grievance or negotiating or administering a collective bargaining agreement" and "[n]egotiating, entering into, or carrying out a voluntary recognition agreement with a labor organization." § 16647(a), (d).

The statute requires employers covered by sections 16645.2 or 16645.7 to certify that no state funds will be used to assist, promote or deter union organizing. § 16645.2(c), 16645.7(b). The statute also requires employers who make expenditures to assist, promote or deter union organizing to maintain and provide upon request "records sufficient to show that state funds have not been used for those

expenditures." § 16645.2(c), 16645.7(c).[2] If an employer commingles state and other funds, the statute presumes that any expenditures to assist, promote or deter union organizing derive in part from state funds. § 16646(b).

Employers who violate sections 16645.2 or 16645.7 are subject to fines and penalties, which include the return of the state funds used for the prohibited purposes and a civil penalty equal to twice the amount of those funds. § 16645.2(d), 16645.7(d). Suspected violators may be sued by the State Attorney General or any private taxpayer. § 16645.8(a)-(c). Prevailing plaintiffs, and prevailing taxpayer intervenors who make substantial contributions, are "entitled to recover reasonable attorney's fees and costs." § 16645.8(d).

In April 2002, plaintiffs-appellees (collectively the "Chamber of Commerce") brought an action for injunctive and declaratory relief challenging the statute on numerous grounds, including NLRA preemption. The AFL-CIO and others (collectively the "AFL-CIO") intervened. In May 2002, the Chamber of Commerce moved for summary judgment. Defendants, who are the California Department of Health Services and state officials sued in their official capacity (collectively "California"), filed motions for summary judgment in August 2002.

On September 16, 2002, the district court granted partial summary judgment in favor of the Chamber of Commerce, holding that the NLRA preempts sections 16645.2 and 16645.7 under the Supreme Court's *Machinists* decision, because they "regulate [ ] employer speech about union organizing under specified circumstances, even though Congress intended free debate." The district court entered judgment in January 2003. It also issued an injunction prohibiting California and the AFL-CIO from taking any

[2] The statute does not require "employers to maintain records in any particular form." § 16648.

actions to enforce sections 16645.2 and 16645.7 against any employer covered by the NLRA.

STANDARD OF REVIEW

We review de novo both a district court's grant of summary judgment, *Winterrowd v. American General Annuity Ins. Co.*, 321 F.3d 933, 937 (9th Cir.2003), and its preemption analysis, *Ting v. AT & T*, 319 F.3d 1126, 1135 (9th Cir.2003).

DISCUSSION

I. The Market Participant Exception to NLRA Preemption

Before addressing the merits of the preemption issue, we first must decide whether California's conditioning the use of its funds constitutes "regulation." "A prerequisite to preemption [under the NLRA] is a finding that the state or local action in question constitutes *regulation* of labor relations between employers and employees." *Alameda Newspapers, Inc. v. City of Oakland*, 95 F.3d 1406, 1413 (9th Cir.1996). The NLRA "does not preempt actions taken by a state when it . . . acts as a mere proprietor or market participant." *Dillingham Constr. N.A., Inc. v. County of Sonoma*, 190 F.3d 1034, 1037 (9th Cir.1999) (citing *Bldg. & Constr. Trades Council of the Metro. Dist. v. Associated Builders & Contractors of Mass./R.I., Inc.*, 507 U.S. 218, 227, 113 S.Ct. 1190, 122 L.Ed.2d 565 (1993) (" *Boston Harbor* ")). We conclude that California has acted as a regulator in enacting § 16645.2 and 16645.7, and that the market participant exception does not apply.

Two Supreme Court cases define the scope of the market participant exception: *Wisconsin Department of Industry v. Gould Inc.*, 475 U.S. 282, 287, 106 S.Ct. 1057, 89 L.Ed.2d 223 (1986), and *Boston Harbor*, 507 U.S. at 218, 113 S.Ct.

1190.[3] In *Gould*, the Court addressed a Wisconsin statute that forbade state procurement agents from using state funds to purchase products manufactured or sold by "labor law violators," employers who had violated the NLRA three times within a five year period. 475 U.S. at 283-84, 106 S.Ct. 1057. Wisconsin conceded that it did not have the power to bar its residents from doing business with repeat violators of the NLRA. *Id.* at 287, 106 S.Ct. 1057. It argued, however, that its statutory scheme was not unlawful because the statute merely regulated the spending power of its procurement officers. *Id.* The Court found this to be a "distinction without a difference" because the Wisconsin statute "serve[d] plainly as a means of enforcing the NLRA. [Wisconsin] concede[d], as we think it must, that the point of [its] statute is to deter labor law violations and to reward fidelity to the law." *Id.* (internal quotation marks omitted). The Court emphasized the "rigid and undiscriminating manner" in which the statute operated, and held that"[n]o other purpose" could be ascribed to the statute than creating an additional remedy for violations of the NLRA. *Id.* at 287-88, 106 S.Ct. 1057.

In *Boston Harbor*, on the other hand, the Court held that the Massachusetts Water Resources Authority, a state agency, acted as a market participant when it required contractors working on the clean-up of Boston Harbor to agree to the terms of a project labor agreement negotiated by a project construction manager and a labor union. The Court concluded that there was "no question but that [the state

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[3] Our discussion here is limited to the context of the market participant exception under the NLRA. A market participant exception exists in a number of other contexts, such as cases under the Commerce Clause. *See, e.g., Big Country Foods, Inc. v. Bd. of Educ. of Anchorage*, 952 F.2d 1173, 1177-79 (9th Cir.1992) (discussing market participant exception in the dormant Commerce Clause context). We offer no opinion as to the applicability of our reasoning to the market participant exception in these other contexts.

agency] was attempting to ensure an efficient project that would be completed as quickly and effectively as possible at the lowest cost." 507 U.S. at 232, 113 S.Ct. 1190. The Court also noted that "the challenged action in this litigation was specifically tailored to one particular job, the Boston Harbor cleanup project," and that there was no reason to believe that the government was motivated by anything but purely proprietary interests. *Id.*

We have applied these cases in a number of contexts, without formulating a general rule for applying the market participant exception. We held that the market participant exception did not apply to a California law that permitted employees in state-approved apprenticeship programs to receive less than the prevailing wage but required employees in non-approved apprenticeship programs to receive the prevailing wage. *See Dillingham,* 190 F.3d at 1037-38 (noting that the apprenticeship standards were not "based upon unique needs that the . . . project presented" and that the state was not motivated by "management concerns" in implementing the standards). On the other hand, we applied the exception and held that the City of Oakland was a market participant when it canceled a newspaper subscription and refused to continue to pay for advertising during a labor dispute. *Alameda Newspapers, Inc. v. City of Oakland,* 95 F.3d 1406, 1415-16 (9th Cir.1996). We have also held that a city may require private contractors to adhere to the terms of a collective bargaining agreement when doing business with the city. *Assoc. Builders & Contractors, Inc. v. City of Seward,* 966 F.2d 492, 496 (9th Cir.1992).[4]

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[4] *City of Seward,* which was decided before the Supreme Court's decision in *Boston Harbor*, creates some confusion about the relation of the market participant exception to other NLRA preemption doctrines. *City of Seward* concluded that "action taken by the state as a market participant is not automatically immune from NLRA preemption." 966 F.2d at 495. *Boston Harbor*, however, held explicitly that the "[NLRA] pre-emption doctrines apply only to state *regulation* " and it plainly held that "a State may act without offending the pre-emption principles of the

The combined teaching of these cases is that when a state uses its spending power to shape the overall labor market in a manner that is essentially nonproprietary, the market participant exception will not apply and the state action may be subject to NLRA preemption. We draw upon the reasoning of the Fifth Circuit, which uses a two-part test as an aid in determining when the market participant exception applies:

> First, does the challenged action essentially reflect the entity's own interest in the efficient procurement of needed goods and services, as measured by comparison with the typical behavior of private parties in similar circumstances? Second, does the narrow scope of the challenged action defeat an inference that its primary goal was to encourage a general policy rather than address a specific proprietary problem? Both questions seek to isolate a class of government interactions with the market that are so narrowly focused, and so in keeping with the ordinary behavior of private parties, that a regulatory impulse can be safely ruled out.

Cardinal Towing & Auto Repair, Inc. v. City of Bedford, 180 F.3d 686, 693 (5th Cir.1999).

NLRA when it acts as a proprietor." 507 U.S. at 227, 229-30, 113 S.Ct. 1190. *Boston Harbor*, therefore, makes clear that once a state's action falls within the "market participant" exception, it is entirely protected from preemption under the NLRA. Therefore to the extent that *City of Seward* states otherwise, we hold that it has been overruled. *See Miller v. Gammie,* 335 F.3d 889, 900 (9th Cir.2003) (en banc) (holding that we may overrule prior circuit precedent without taking a case en banc when the Supreme Court has "undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable"). Of course, as we hold here, a state may enact "regulation" through the use of its spending power.

The first prong, which looks to the nature of the expenditure, protects comprehensive state policies with wide application from preemption, as long as the type of state action is essentially proprietary. *See Building & Constr. Trades Dep't, AFL-CIO v. Allbaugh,* 295 F.3d 28, 34-36 (D.C.Cir.2002) (holding an executive order that applied to all federally funded construction projects not preempted, where the order concerned a project labor agreement that private employers often enter into in the construction field). The second prong, which looks at the scope of the expenditure, protects narrow spending decisions-decisions that do not necessarily reflect a state's interest in the efficient procurement of goods or services but that also do not have the effect of broader social regulation. *See, e.g., Alameda Newspapers,* 95 F.3d at 1417-18. Both prongs are methods of determining whether the state action at issue in fact constitutes regulation.

Here, we conclude that sections 16645.2 and 16645.7 are regulatory and thus not covered by the market participant exception. Turning to the first prong, the statute on its face does not purport to reflect California's interest in the efficient procurement of goods and services, as measured by the similar behavior of private parties. Rather, the statute's preamble makes clear that the legislative purpose is not procurement, but preventing the state from influencing employee choice about whether to join a union. § 16645, Historical and Statutory Notes, Section 1 of Stats.2000, c. 872 ("It is the policy of the state not to interfere with an employee's choice about whether to join or to be represented by a labor union. *For this reason,* the state should not subsidize efforts by an employer to assist, promote, or deter union organizing.") (emphasis added).

Nor do sections 16645.2 and 16645.7 have a narrow scope or any other element that would indicate that the statute is unrelated to broader social regulation. To the contrary, the statute by its design sweeps broadly to shape policy in the overall labor market. The statute applies to all employers in

California who accept any state grant or funding in excess of $10,000. § 16645.2, 16645.7. It imposes separate accounting requirements on any business that accepts a state grant or enters into a contract with the state for more than $10,000. *Id.* It contains a provision for civil penalties and permits private parties to file civil actions against employers who violate the statute. § 16645.2(d), 16645.8. The statute's scope indicates a general state position, not a narrow attempt to achieve a specific goal. Thus, there is no question but that sections 16645.2 and 16645.7 are designed to have a broad social impact, by altering the ability of a wide range of recipients of state money to advocate about union issues.[5] Therefore, we conclude that sections 16645.2 and 16645.7 are regulatory measures that do not fall within the market participant exception.

II. NLRA Preemption

That sections 16645.2 and 16645.7 are regulatory measures does not mean that they are automatically preempted by the NLRA. "We are reluctant to infer preemption," *Boston Harbor,* 507 U.S. at 224, 113 S.Ct. 1190, and any analysis of preemption begins with the "basic assumption that Congress did not intend to displace state law." *Maryland v. Louisiana,* 451 U.S. 725, 746, 101 S.Ct. 2114, 68 L.Ed.2d 576 (1981). Preemption is a question of congressional intent, and the "purpose of Congress is the

[5] This case is thus distinct from *Alameda Newspapers,* where we concluded that a city's proclamation of support in favor of a labor union in an ongoing strike at a local newspaper, as well as the city's decision to refrain from purchasing advertisements and to cancel its subscriptions as a result of the strike, was not regulation subject to NLRA preemption. 95 F.3d at 1409. We emphasized the merely exhortatory nature of the proclamation, noting that "[t]he resolution has no binding force on anyone." *Id.* at 1414. We also noted that the cancellation of the subscriptions and refusal to advertise did not "have some 'real effect' or practical economic impact on the employer that is either different from that of the ordinary customer or is otherwise governmental in nature." *Id.* at 1416.

ultimate touchstone of pre-emption analysis." *Alameda Newspapers*, 95 F.3d at 1413 (quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 504, 98 S.Ct. 1185, 55 L.Ed.2d 443 (1978) (internal quotation marks omitted)). Although the NLRA contains no express preemption provision, the Supreme Court has articulated two distinct NLRA preemption principles: *Garmon* preemption, set forth in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959), which prohibits states from regulating in the zone reserved for NLRB jurisdiction, and *Machinists* preemption, set forth in *Lodge 76, International Association of Machinists & Aerospace Workers v. Wisconsin Employment Relations Commission*, 427 U.S. 132, 96 S.Ct. 2548, 49 L.Ed.2d 396 (1976). *See Boston Harbor*, 507 U.S. at 224-26, 113 S.Ct. 1190. We hold that sections 16645.2 and 16645.7 are pre-empted under *Machinists*, and therefore do not reach the question of *Garmon* preemption.

Machinists preemption is based on the premise that by regulating certain parts of the collective bargaining process, Congress intended other parts to be free from state regulation and left "to be controlled by the free play of economic forces." *Machinists*, 427 U.S. at 140, 96 S.Ct. 2548 (internal quotation marks omitted). The doctrine "is based on the premise that 'the use of economic pressure by the parties to a labor dispute is . . . part and parcel of the process of collective bargaining,' "which means that "neither a state nor the [NLRB] is 'afforded flexibility in picking and choosing which economic devices of labor and management shall be branded unlawful.'" *Alameda Newspapers*, 95 F.3d at 1413 (quoting *Machinists*, 427 U.S. at 144, 149, 96 S.Ct. 2548). "*Machinists* pre-emption preserves Congress' intentional balance between the uncontrolled power of management and labor to further their respective interests." *Boston Harbor*, 507 U.S. at 226, 113 S.Ct. 1190 (internal quotation marks omitted).

California and the AFL-CIO argue that Congress did not intend the NLRA to limit a state's ability to control its own funds. Conditions on the use of state funds are, they say, categorically different from more direct restrictions on the labor organizing process. Because sections 16645.2 and 16645.7 allow parties an unfettered ability to use non-state funds to advocate for or against union organization, California and the AFL-CIO claim that the statute merely affects California's use of its own funds and does not impermissibly regulate in any area the NLRA intended to be regulation-free.

This argument has some force. Congress has offered no explicit guidance in this area, either in the NLRA itself, or in the legislative history of the Act. *See Garner v. Teamsters, Chauffeurs and Helpers Local Union*, 346 U.S. 485, 488, 74 S.Ct. 161, 98 L.Ed. 228 (1953) ("The [N]ational Labor Management Relations Act ··· leaves much to the states, though Congress has refrained from telling us how much."). Moreover, the emphasis of *Machinists* preemption on "restrictions on economic weapons of selfhelp," *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 614, 106 S.Ct. 1395, 89 L.Ed.2d 616 (1986), poses a particular difficulty in the context of state restrictions on the use of a state's own funds, because when a state imposes such conditions it is arguably not restricting self-help by private parties but merely the degree to which state money is used to fund such self-help. Because the California statute regulates no more than the uses to which California's own funds are put, rather than imposing a collateral penalty on additional private behavior not funded by the state, the Supreme Court cases that have found state exercises of the spending power preempted by the NLRA are not directly controlling. *See Gould*, 475 U.S. at 287-89, 106 S.Ct. 1057 (state denying procurement business to private employers who were repeat labor law violators); *Golden State*, 475 U.S. at 615, 618, 106 S.Ct. 1395 (city conditioning renewal of a taxi company's franchise on settlement of a labor dispute).

Nonetheless, we conclude that the NLRA preempts the California statute. Although the *Machinists* doctrine does not normally prevent neutral state regulation of the labor market, it does prevent state law that both explicitly targets and directly regulates processes controlled by the NLRA. Because the California statute, on its face, directly regulates the union organizing process itself and imposes substantial compliance costs and litigation risk on employers who participate in that process, it interferes with an area Congress intended to leave free of state regulation. It is therefore preempted under *Machinists*.

A. *Machinists* and Advocacy for or Against Union Organizing

As explained above, the theory of *Machinists* preemption is that by establishing certain parameters for the union organizing process in the NLRA, Congress intended to leave other aspects of the bargaining process to the "free play of economic forces" and otherwise unregulated by the states. *Machinists*, 427 U.S. at 140, 96 S.Ct. 2548 (noting that the "crucial inquiry" is whether "Congress intended that the conduct involved be unregulated because left to be controlled by the free play of economic forces") (internal quotation marks omitted). The ability of labor and management to advocate for or against unionization is one such aspect of the collective bargaining process. 29 U.S.C. § 158(c) (NLRA § 8(c)) provides that:

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

An extensive jurisprudence has developed around Congress' balancing of speech interests in the context of labor organizing, a jurisprudence emphasizing that open and robust advocacy by both employers and employees must

exist in order for the NLRA collective bargaining process to succeed. *See Steam Press Holdings, Inc. v. Hawaii Teamsters & Allied Workers Union*, 302 F.3d 998, 1009 (9th Cir.2002) ("Collective bargaining will not work, nor will labor disputes be susceptible to resolution, unless both labor and management are able to exercise their right to engage in uninhibited, robust, and wide-open debate.") (internal quotation marks omitted). We note further that where the NLRA has sought to put limits on advocacy for or against union organization, it has expressly set forth the mechanisms for doing so. Sections 8(a) and 8(b) of the Act set out a series of restrictions in the form of unfair labor practices on the ability of employees and unions to achieve their goals, whereas section 8(c) expressly exempts the general expression of views on union organization from these restrictions. *See, e.g.*, 29 U.S.C. § 158(b)(7) (NLRA § 8(b)(7)) (prohibiting, in certain circumstances, picketing by a labor union where the union is not certified as the representatives of the employee).

To be sure, the states are not forbidden from any and all regulation of employer and union speech during the collective bargaining process. *See, e.g., Linn v. United Plant Guard Workers of Am., Local 114*, 383 U.S. 53, 61, 86 S.Ct. 657, 15 L.Ed.2d 582 (1966) (upholding state jurisdiction over defamation suits in the context of union organizing, but limiting such jurisdiction to defamation made with actual knowledge of falsity or reckless disregard for the truth). But an overriding principle of the NLRA is that the collective bargaining process cannot function unless both employers and employees have the ability to engage in open and robust debate concerning unionization.[6] *See NLRB v. Jones &*

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[6] We do not decide here whether such open debate on unionization is an affirmative right that the NLRA itself "protects" or "arguably protects," which would be necessary predicates for a finding of *Garmon* preemption. *See Golden State*, 475 U.S. at 613, 106 S.Ct. 1395 (explaining that *Garmon* preemption prohibits states from regulating

Laughlin Steel Corp., 301 U.S. 1, 45, 57 S.Ct. 615, 81 L.Ed. 893 (1937) ("The theory of the Act is that free opportunity for negotiation . . . may bring about the adjustments and agreements which the Act in itself does not attempt to compel."). The NLRA's declared purpose is to "restor[e] equality of bargaining power" by, among other ways, "encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment." 29 U.S.C. § 151 (NLRA § 1).

Therefore, by addressing employer actions that assist, promote or deter union organizing, California's statute targets a process necessary to the functioning of the overall process established by the NLRA. As one influential authority puts it:

> Providing a legal framework for self-organization and collective bargaining involves determining not only how far the conduct of employers and unions should be regulated but also how far they should be free. In revising the employer unfair labor practice provisions of the Wagner Act in 1947, Congress necessarily decided not only what coercive tactics should be forbidden, but also what methods of persuasion should be permitted employers seeking to induce their employees not to join labor unions.

"activity that the NLRA protects, prohibits, or arguably protects or prohibits"). Our holding rests entirely on the belief that California is preempted under *Machinists* from regulating pro-or anti-unionization advocacy because such regulation interferes with the *process* protected by the NLRA, not any specific right protected by the statute.

Archibald Cox, *Labor Law Preemption Revisited,* 85 HARV. L. REV. 1337, 1352 (1972) (cited with approval in *Machinists,* 427 U.S. at 140 n. 4, 96 S.Ct. 2548).

B. Direct State Interference

To violate *Machinists,* however, the state regulation at issue must do more than incidentally affect the union organizing process. The Supreme Court has consistently distinguished between state laws of general applicability (such as regulation of labor conditions), which generally are not preempted by the NLRA, and state regulation of the NLRA process itself, which generally is preempted. *See Machinists,* 427 U.S. at 156, 96 S.Ct. 2548 (Powell, J., concurring) ("[The *Machinists* doctrine] does not ··· preclude the States from enforcing, in the context of a labor dispute, 'neutral' state statutes or rules of decision: state laws that are not directed toward altering the bargaining positions of employers or unions but which may have an indirect effect on relative bargaining strength."). For example, state regulation of minimum labor conditions is generally not preempted. *See Metropolitan Life,* 471 U.S. at 753, 105 S.Ct. 2380 (holding that the NLRA is not particularly concerned with, and is not intended to affect, the "substantive terms of the bargain that is struck when the parties are negotiating from relatively equal positions"); *Fort Halifax Packing Co. v. Coyne,* 482 U.S. 1, 20-21, 107 S.Ct. 2211, 96 L.Ed.2d 1 (1987) (holding that because "[b]oth employers and employees come to the bargaining table with rights under state law that form a backdrop for their negotiations," the NLRA does not preempt substantive minimum labor standards, although it does preempt direct state interference with the NLRA's "equitable bargaining process") (internal quotation marks omitted). Nor will the NLRA normally preempt ordinary state contract law of general applicability. *See Belknap, Inc. v. Hale,* 463 U.S. 491, 500, 103 S.Ct. 3172, 77 L.Ed.2d 798 (holding that the NLRA does not preempt state law contract actions by

replacement workers to enforce terms of an employment contract).[7]

The situation is different, however, when the state regulation directly targets a process that is central to the union organizing and collective bargaining system established by the NLRA. This is true regardless of whether the direct state regulation is designed to benefit employers, employees or even the public at large. As Justice Powell noted, "State laws should not be regarded as neutral if they reflect an accommodation of the special interests of employers, unions, or the public in areas such as employee self-organization, labor disputes, or collective bargaining." *Machinists,* 427 U.S. at 156 n.*, 96 S.Ct. 2548 (Powell, J., concurring).

Moreover, for the purposes of this analysis, we are concerned with the state statute's function, not its form. We are to focus on "the nature of the activities which the States have sought to regulate, rather than on the method of regulation adopted." *Golden State,* 475 U.S. at 614 n. 5, 106 S.Ct. 1395 (internal quotation marks omitted); *see also Gould,* 475 U.S. at 289, 106 S.Ct. 1057 ("It is the conduct being regulated, not the formal description of governing legal standards, that is the proper focus of concern."). In *Golden State,* the Court explicitly rejected the argument that state regulation was immune from *Machinists* preemption because the regulation took the form of a traditional use of local authority to grant a benefit, and preempted an exercise of a city's decision to grant a taxi franchise. 475 U.S. at 615, 618, 106 S.Ct. 1395. Although a state's ability to control the use of its funds is an important state interest, regulation that

[7] We also note that *Garmon* permits considerable latitude to states to enforce traditionally local law. "Under *Garmon,* a state may regulate conduct that is of only peripheral concern to the Act or that is so deeply rooted in local law that the courts should not assume that Congress intended to pre-empt the application of state law." *Belknap,* 463 U.S. at 509, 103 S.Ct. 3172.

specifically targets and substantially affects the NLRA bargaining process will be preempted, even if such regulation comes in the form of a restriction on the use of state funds.

C. The California Statute

To summarize, state regulation is preempted when it directly targets and substantially affects open employer discussion about unionization, even if such regulation comes in the form of a restriction on the use of state funds. The focus of our preemption analysis is on whether the state statute directly interferes with federal labor policy, not the state statute's formal nature. *See Gould,* 475 U.S. at 289, 106 S.Ct. 1057. Under these principles, the California statute is clearly preempted, even though it restricts only the use of California's own funds.

The statute has both the explicit purpose and the substantive effect of interfering with the NLRA system for organizing labor unions. By explicitly targeting activity designed to "assist, promote, or deter union organizing" the statute is on its face designed to interfere directly with the NLRA's own system for the promotion or deterrence of union organizing by employers and employees. The statute will alter the NLRA process of collective bargaining and union organizing, because an employer who decides against neutrality will incur both compliance costs and litigation risk. Employers are required to maintain separate accounts for state funds and non-state funds (if they wish to use any private funds for speech on union organization), and they must make those records available to the state's attorney general upon request. § 16645.2(c). If an employer fails to keep such records, any funds spent on assisting, promoting or deterring union organization will be allocated "between state funds and other funds on a pro rata basis," which means that an employer who fails to segregate funds and then spends any money assisting, promoting or deterring union

organizing is automatically subject to the statute's remedial provisions. § 16646(b); *see* § 16645.2(d), 16645.7(d).

Crucially, the statute contains not only a provision for compensatory damages to the state and injunctive and equitable relief, but also makes employers who violate the statute liable for a civil penalty of up to twice the amount of state funds spent on union organizing. § 16645.2(d), 16645.7(d). An additional provision permits any state taxpayer-including, of course, a union in a dispute with an employer-to bring a suit under the statute. § 16645.8. Thus, the statute imposes not merely a corrective remedy for the misuse of state funds, but risks imposing an actively punitive sanction on employers engaged in union organizing disputes. The Supreme Court has warned that such punitive measures are of particular concern in the NLRA context. *See Gould,* 475 U.S. at 288 n. 5, 106 S.Ct. 1057 ("The conflict between the challenged . . . statute and the NLRA is made all the more obvious by the essentially punitive rather than corrective nature of [the] remedy.")

The statute, therefore, both substantially and purposefully alters the balance of forces in the union organizing process, interfering directly with a process protected by the NLRA. We need not decide whether any one aspect of the statute, taken alone, would suffice to warrant preemption. Taken as a whole, the statute constitutes substantive regulation of "Congress' intentional balance between the uncontrolled power of management and labor to further their respective interests." *Boston Harbor,* 507 U.S. at 226, 113 S.Ct. 1190 (internal quotation marks omitted). We therefore must hold that it is preempted by federal law.

D. Facial v. As-Applied Challenge

California and the AFL-CIO further argue that preemption should not apply because this is a facial, not an as-applied, challenge, noting that a facial challenge to a statute will be upheld only when a challenger can "establish that no set of circumstances exists under which the Act would be valid."

United States v. Salerno, 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987); *see also California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 107 S.Ct. 1419, 94 L.Ed.2d 577 (1987) (applying *Salerno* standard to a statutory preemption case). The Chamber of Commerce responds that this is an as-applied challenge, with the question being whether the statute is invalid as applied to all employers covered by the NLRA. We need not decide whether the *Salerno* standard applies here, because even if it did sections 16645.2 and 16645.7 would be preempted as to all employers covered by the NLRA.

The facial/as-applied distinction would be relevant only if we might find some applications of the statute preempted and others not. In some cases, statutes will have certain applications that do not regulate in an area controlled by the NLRA, and this will be an appropriate distinction. For example, that the City of Los Angeles' use of its franchise power was preempted under the facts of *Golden State* did not mean that the NLRA preempted the city's ability to franchise taxi companies generally. *See* 475 U.S. at 619, 106 S.Ct. 1395.

Where a party makes a facial *Machinists* preemption challenge to a statute that directly targets a process established by the NLRA, however, the question is not whether the application of a state statute to a single set of facts is permissible, but whether the state has acted to regulate generally in an area that Congress intended to be "a zone free from all regulations, whether state or federal." *Boston Harbor*, 507 U.S. at 226, 113 S.Ct. 1190. In these circumstances, we are concerned with delimiting areas of potential conflict:

> potential conflict of rules of law, of remedy, and of administration. The nature of the judicial process precludes an *ad hoc* inquiry into the special problems of labor-management relations involved in a particular set of occurrences in order to ascertain the precise nature and

> degree of federal-state conflict there involved, and more particularly what exact mischief such a conflict would cause. . . . Our task is confined to dealing with classes of situations.

Garmon, 359 U.S. at 242, 79 S.Ct. 773. Thus, where a state statute is in direct conflict with the NLRA or one of its processes, our focus is the act of regulation itself, not the effect of the state regulation in a specific factual situation.

This principle is particularly apposite here, because forcing courts to make case-by-case judgments on the permissible scope of the California statute would encourage some dubious judicial line-drawing. From our *Machinists* analysis above, it is clear that the statute would be preempted as applied to a private business funded entirely by the state. But would the statute be preempted as applied to a business that receives 25 percent of its funds from the state? What about one that takes only 15 percent of its income from state funds? It is difficult to discern a principled basis upon which to draw these distinctions. Given the Supreme Court's clear instructions about the purposes of labor law preemption, we cannot embrace the legal uncertainty-and resulting litigation-that would arise from a more piecemeal approach.

We hold that the California statute is preempted because California has burdened the NLRA through the very act of regulating. There is thus "no set of circumstances ··· under which the Act would be valid" as to employers covered by the NLRA. *Salerno,* 481 U.S. at 745, 107 S.Ct. 2095. Even assuming *arguendo* that the Chamber of Commerce's preemption challenge is properly characterized as facial, the statute is still pre-empted.

E. The First Amendment, State Subsidies and NLRA Preemption

We must also consider an analogy California and the AFL-CIO draw from constitutional law. First Amendment jurisprudence distinguishes direct restrictions on speech from instances where the government limits the use of government

funds to subsidize speech or conduct. *See, e.g., Rust v. Sullivan,* 500 U.S. 173, 192-93, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991) (holding that Congress may require recipients of federal funds to refrain from using those funds to encourage, promote or advocate for abortion as a means of birth control); *Regan v. Taxation with Representation of Wa.,* 461 U.S. 540, 545-46, 103 S.Ct. 1997, 76 L.Ed.2d 129 (1983) (holding that Congress did not violate the First Amendment by denying a tax exemption to groups that engage in lobbying); *Lyng v. UAW,* 485 U.S. 360, 369, 108 S.Ct. 1184, 99 L.Ed.2d 380 (1988) (holding that the federal government is not required by the First Amendment to subsidize an employee's right to expression on union matters by allowing a striking worker to receive food stamps). These cases hold that the government may choose to subsidize particular speech on particular issues without automatically running afoul of the First Amendment. There is a further distinction between cases "in which the Government has placed a condition on the *recipient* of the subsidy . . ., thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program," and cases in which the government merely restricts the use of its own funds. *Rust,* 500 U.S. at 196-97, 111 S.Ct. 1759. Although conditions on a grant recipient may violate the First Amendment under the "unconstitutional conditions" jurisprudence, the government is allowed more constitutional latitude in directing the expenditure of its own funds. *Id.* at 197, 111 S.Ct. 1759.

The issue here is not whether California may as a constitutional matter exercise control over its own funds to discourage speech about union organizing. Rather, we must look to see whether Congress intended, when it enacted the NLRA, to allow California to exercise its spending power in this manner. Use of constitutional doctrine in this area is solely by analogy, and we must determine whether California and the AFL-CIO's analogy to the First Amendment is apt. In some NLRA cases, drawing on First

Amendment analogies to construe the statute will be appropriate. *See Linn,* 383 U.S. at 67, 86 S.Ct. 657 (applying constitutional standards in statutory interpretation of the NLRA, but noting that "[w]e deal here not with a constitutional issue but solely with the degree to which state remedies have been pre-empted by the Act").

However, First Amendment concepts cannot be imported wholesale in construing the NLRA for the purpose of preemption analysis-especially when to apply constitutional analysis mechanically would substantially alter the balance of forces established by Congress under the statute. We have long recognized that the balance between employer and employee expression established by the NLRA differs substantially from the standard First Amendment balancing of speech interests. *See, e.g., NLRB v. Associated Gen. Contractors, Inc.,* 633 F.2d 766, 772 n. 9 (9th Cir.1980) ("Association that would otherwise be protected [by the First Amendment] may be regulated if necessary to protect substantial rights of employees or to preserve harmonious labor relations in the public interest."); *White v. Lee,* 227 F.3d 1214, 1236-37 (9th Cir.2000) ("The First Amendment rights of employers in the context of the labor relations setting are limited to an extent that would rarely, if ever, be tolerated in other contexts. . . . Regulations controlling . . . expressive activity[in the labor context] would almost certainly be invalid outside the labor relations setting.") (internal quotation marks omitted). If the unique balance between employer and employee speech established by the NLRA imposes unique constraints on expression by individuals, there is no reason to believe that it does not also impose unique constraints on the ability of states to influence expression through government subsidies.

Put simply, we should not assume that Congress would intend to create a carefully balanced "regulation free zone," *Golden State,* 475 U.S. at 614, 106 S.Ct. 1395, under the NLRA and then permit states to regulate that zone through the device of conditions on state funding. The constitutional

analysis of cases like *Rust* is inapposite in this case.[8] Rather, the question we confront is the same one we would confront in any case of *Machinists* preemption: does the " 'exercise of plenary state authority to curtail or entirely prohibit self-help . . . frustrate effective implementation of the Act's processes[?]' "*Machinists*, 427 U.S. at 147-48, 96 S.Ct. 2548 (quoting *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 380, 89 S.Ct. 1109, 22 L.Ed.2d 344 (1969)). For the reasons we have discussed above, we conclude that the California statute does impermissibly interfere with processes that the NLRA meant to leave free from regulation.

F. Federal Grant Programs

California and the AFL-CIO note a number of federal statutes that limit employers' use of specific *federal* grant or program funds to advocate for or against union organizing. *See, e.g.*, Workforce Investment Act, 29 U.S.C. § 2931(b)(7) (providing that "[e]ach recipient of funds . . . shall provide to the Secretary assurances that none of such funds will be used to assist, promote, or deter union organizing."); National and Community Service State Grant Program, 42 U.S.C. 12634(b)(1) ("Assistance provided under this subchapter shall not be used by program participants and program staff to ··· assist, promote, or deter union organizing"). California

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[8] We also note that First Amendment doctrine is not as supportive of an unfettered ability of California to control its spending as California and the AFL-CIO suggest. Although the government is, when it is engaging in "governmental speech," entitled to a very substantial ability to condition the use of its own funds, where the party funded is "not the government's speaker" and the relevant advocacy "cannot be classified as governmental speech even under a generous understanding of the concept" the analysis differs from that of *Rust*. *See Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541-43, 121 S.Ct. 1043, 149 L.Ed.2d 63 (2001). Although we offer no opinion as to how California's restrictions would fare under constitutional analysis, state regulation is not automatically immune from First Amendment concern simply because that regulation comes in the form of a subsidy rather than a prohibition.

and the AFL-CIO argue that the existence of these statutes is evidence of Congress' desire to permit regulatory schemes such as sections 16645.2 and 16645.7.

Although there is again some force to this argument, we are not persuaded that these federal program-grant restrictions were either intended to alter or actually did alter the "wider contours of federal labor policy." *Metropolitan Life,* 471 U.S. at 753, 105 S.Ct. 2380 (internal quotation marks omitted). Had Congress imposed a federal version of sections 16645.2 and 16645.7 with directly analogous spending restrictions on all federal government grants or expenditure, that would weigh significantly against finding preemption here. *See id.* at 755, 105 S.Ct. 2380 (inferring from the existence of federal minimum labor standards that Congress did not intend state minimum labor standards to be preempted by the NLRA). But this is not the nature of these few statutes, which-unlike the California statute's spending restrictions that affect all state grants over $10,000-apply only to certain, specific federal spending. Nor do these federal statutes contain comparable remedial provisions, such as section 16645.8's authorization of citizen suits or the civil penalty imposed by section 16645.2(d). Given the limited application and scope of these federal statutes, we find them to be too ambiguous a basis for inferring congressional intent to permit California's intrusion into the collective bargaining process through sections 16645.2 and 16645.7.

Each party shall bear its own costs on appeal.

AFFIRMED.

United States District Court, C.D. California, Southern Division.

THE CHAMBER OF COMMERCE OF THE U.S., et al. Plaintiffs,

v.

Bill LOCKYER, et al., Defendants.

No. SA CV 02-0377 GLT.

Sept. 16, 2002.

ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT IN PART

TAYLOR, District Judge.

Plaintiffs' Motion for Summary Judgment is GRANTED in part.

I. *BACKGROUND*

Plaintiffs filed claims for declaratory and injunctive relief regarding Defendants' enforcement of the California Assembly Bill 1889 adding California Government Code § 16645 and following. AB 1889 prohibits the use of state funds or property to assist, promote, or deter union organizing; allows remedies for such violations; and requires state fund recipients to maintain sufficient records to show state funds were not improperly used under AB 1889. The Attorney General may request a copy of such records.

Plaintiffs bring a Motion for Summary Judgment arguing AB 1889 is unconstitutional under the federal and California Constitutions and preempted by the National Labor Relations Act (NLRA), Labor Management Reporting and Disclosure Act (LMRDA), and the Medicare Act. Defendants and Intervenors[1] contend Plaintiffs' claims are barred by the 11th

[1] The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) and California Labor Federal, AFL-CIO, are Intervenors defending AB 1889.

Amendment, the abstention doctrine, and Article III standing requirements.[2]

II. DISCUSSION

Summary judgment is proper if "there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. Proc. 56(c). A fact is material if it "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2509, 91 L.Ed.2d 202 (1986). A factual dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

A. Preliminary Issues

Defendants and Intervenors argue the Court should not consider the merits of the case because Plaintiffs lack standing and Plaintiffs' claims are barred by the Eleventh Amendment and the abstention doctrine.

1. *11th Amendment*

Defendants argue the Eleventh Amendment prevents the Court from considering Plaintiffs' claim based on violations of the California Constitution. The Eleventh Amendment has been interpreted as a grant of sovereign immunity to the states against suit in federal court. *See Seminole Tribe of Florida v. Florida,* 517 U.S. 44, 54, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996). State officials may be subject to suits for declaratory and injunctive relief where enforcement of state law would violated the U.S. Constitution or federal statutes, *Ex Parte Young,* 209 U.S. 123, 166, 28 S.Ct. 441, 52 L.Ed. 714 (1908); *Idaho v. Coeur d'Alene Tribe of Idaho,* 521 U.S. 261, 281, 117 S.Ct. 2028, 138 L.Ed.2d 438 (1997), but the Eleventh Amendment bars suits in federal court

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[2] Defendants and Intervenors motions to strike certain evidence tendered by Plaintiffs is DENIED. Such evidence does not change the outcome of this Order.

against state officials based on claimed violations of state law. *Pennhurst State School & Hosp. v. Halderman,* 465 U.S. 89, 121, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984); *Central Reserve Life of North America Ins. Co. v. Struve,* 852 F.2d 1158, 1161 (9th Cir.1988). The Court will not take into account arguments based on violation of state law in considering the parties' motions for summary judgment.

2. *Standing*

Three components compose the constitutional minimum of Article III standing:

> "First, the plaintiff must have suffered an 'injury in fact'- an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of... Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."

U.S. v. Hays, 515 U.S. 737, 742-43, 115 S.Ct. 2431, 132 L.Ed.2d 635 (1995) (quoting *Lujan,* 504 U.S. at 560-561, 112 S.Ct. 2130). The party seeking the exercise of jurisdiction in his favor has the burden of demonstrating his standing. *Hays,* 515 U.S. at 743, 115 S.Ct. 2431. An organization that has not suffered any injury itself may sue in a representative capacity for injuries to its members if at least one member has standing to present the claim asserted by the association, the interests sought to be protected are germane to the association's purpose, and neither the claim asserted nor the relief requested requires the members' individual participation in the suit. *Hunt v. Washington State Apple Advertising Comm'n,* 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977).

Plaintiffs apparently would not have standing to challenge § 16645.1, 16645.3, and 16645.4, governing reimbursement, activities, and expenditures of state contractors. Plaintiffs claims standing to challenge these sections "based on the

danger they are applicable" and may be interpreted to cover one or more of Plaintiffs, but do not present facts to support this contention. The injury posed by this potential interpretation is "conjectural or hypothetical," and is not sufficient to satisfy the injury-in-fact component of standing. *See Lujan v. Defenders of Wildlife,* 504 U.S. 555, 559-560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).

Plaintiffs also apparently would lack standing to challenge Gov.Code § 16645.6, a provision of AB 1889 prohibiting public employers receiving state funds from using those funds to "assist, promote, or deter union organizing," because the only public employers in the case, members of Plaintiff California Healthcare Association (CHA) are political subdivisions of the state. As political subdivisions of the state, members of Plaintiff CHA do not have standing to sue the state in federal court. *City of South Lake Tahoe v. California Tahoe Regional Planning Agency,* 625 F.2d 231, 233 (9th Cir.1980); *Palomar Pomerado Health System v. Belshe,* 180 F.3d 1104, 1108 (9th Cir.1999).[3]

However, Plaintiffs do have standing to challenge the remaining provisions of AB 1889. When any plaintiff has standing, the standing requirement is satisfied for all other plaintiffs who are proper parties on the same complaint because "the presence of one party with standing assures that [the] controversy before [the court] is justiciable." *Department of Commerce v. United States House of*

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[3] Plaintiffs incorrectly cite *Star-Kist Foods, Inc. v. County of Los Angeles,* 42 Cal.3d 1, 7-8, 227 Cal.Rptr. 391, 719 P.2d 987 (1986), as California Supreme Court authority rejecting *South Lake Tahoe.* In *Star-Kist,* the California Supreme Court exempted Supremacy Clause challenges from the *South Lake Tahoe* "no standing" rule because at that time, the Ninth Circuit had not yet applied the rule to a Supremacy Clause challenge. *Id.,* at 8, 227 Cal.Rptr. 391, 719 P.2d 987. The Ninth Circuit has since held no such exemption exists for Supremacy Clause challenges. *See Palomar Pomerado Health System v. Belshe,* 180 F.3d 1104, 1108 (9th Cir.1999).

Representatives, 525 U.S. 316, 328, 119 S.Ct. 765, 142 L.Ed.2d 797 (1999); *Village of Arlington Heights v. Metropolitan Housing Develop. Corp.*, 429 U.S. 252, 264, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977). At least one Plaintiff, the United States Chamber of Commerce ("U.S.Chamber"), has standing to challenge the remaining provisions of AB 1889, which govern recipients of state funds grants, employers conducting business on state property, and private employers receiving state funds in excess of $10,000. Various U.S. Chamber members receive grants of state funds, conduct business on state property, receive state funds in excess of $10,000, currently use state funds in union-related activities, and do not keep records of the use of state funds. *See* Antonek Decl. ¶¶ 3-6; Hunte Decl. ¶¶ 2-4; Kampas Decl. Exh. B, C. The parties do not dispute Defendant Attorney General Lockyer intends to enforce AB 1889, and has done so through accounting demands and litigation. Plaintiffs have demonstrated an injury in fact redressable by this Court, and have standing to proceed.

3. Abstention

Defendants and Intervenors contend this Court should abstain from hearing the claims of Plaintiff California Association of Healthcare Facilities (CAHF) pursuant to *Younger v. Harris.* 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971)(explaining a federal court should not enjoin or interfere with pending state proceedings). *Younger* provides a federal court should abstain from review and dismiss an action if the federal action would "directly interfere with ongoing state judicial proceedings" involving identical constitutional issues, and the state court can address the federal parties' claims. *See id.* If the *Younger* standard is met, the Court does not have discretion to retain jurisdiction. *See Green v. City of Tucson,* 255 F.3d 1086, 1092-93 (9th Cir.2001).

Defendants and Intervenors argue the Court should dismiss CAHF because Summit Care California, Inc. and

Brier Oak Convalescent Inc., defendants and cross-complainants in *Lockyer v. Summit Care California, Inc., et al.*, a pending state court action concerning AB 1889, are members of CAHF.[4] As stated in this Court's July 2, 2002 Order, if membership in a Plaintiff association is established, such relief would directly interfere with the *Lockyer* action because any relief this Court would award in favor of Plaintiffs would operate to enjoin the pending state proceedings involving Fountain View. *See Cornwell v. Cal. Bd. of Barbering and Cosmetology,* 962 F.Supp. 1260, 1271 (S.D.Cal.1997). Defendants have not established such membership. There is evidence the state defendants own or operate three skilled nursing facilities that are members of CAHF, *see* Armentrout Decl. ¶¶ 6-7, but the Court's view is this is not enough. There is no evidence the state defendants themselves are members of CAHF.

Defendants and Intervenors also argue for the Court's abstention based on *Railroad Comm'n of Texas v. Pullman Co.,* 312 U.S. 496, 500, 61 S.Ct. 643, 85 L.Ed. 971 (1941). *Pullman* abstention is appropriate only when (1) the complaint involves a sensitive area of social policy, (2) a federal constitutional issue could be mooted or narrowed by a definitive state court ruling on state law issues, and (3) proper resolution of the potentially determinative state law issue is uncertain. *Fireman's Fund Ins. Co. v. City of Lodi,* 271 F.3d 911, 928 (9th Cir.2001). Abstention is not proper when the issue is one of federal preemption because preemption is not considered a "constitutional issue." *United States v. Morros,* 268 F.3d 695, 704 (9th Cir.2001).

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[4] During the briefing period for the motion and cross-motions for summary judgment, the state action, formerly *Lockyer v. Fountain View,* was amended to substitute Summit Care and Brier Oak as defendants in place of Fountain View. Parties to the current state action have stipulated the new defendants will assert the same claims and cross-complaint as did the original defendant Fountain View. *See* Def. Request for Judicial Notice, Exh. 4, 5.

Abstention is also inappropriate in First Amendment cases because the guarantee of free expression is an area of particular federal concern rather than simply a sensitive area of state social policy. *See Ripplinger v. Collins,* 868 F.2d 1043, 1048 (9th Cir.1989); *Yniguez v. Arizonans for Official English,* 69 F.3d 920, 930-931 (9th Cir.1995). Plaintiffs challenge AB 1889 on preemption and First Amendment grounds. It is proper for the Court to retain jurisdiction over the Plaintiffs' claims.

B. *Preemption*

The Court finds AB 1889 is preempted by the National Labor Relations Act (NLRA).

Two types of preemption are recognized under the NLRA. "*Garmon* preemption" forbids state regulation of activities actually or "arguably" protected by § 7 of the NLRA or constitute an unfair labor practice under § 8. *Building & Trades Council v. Associated Builders* ("*Boston Harbor*"), 507 U.S. 218, 224-225, 113 S.Ct. 1190, 122 L.Ed.2d 565 (1993); *see also San Diego Building Trades Council v. Garmon,* 359 U.S. 236, 243-244, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959). "*Machinist* preemption" prohibits state and municipal regulation of activities not protected or regulated by the NLRA if Congress intended for these activities to remain unregulated. *Building & Trades Council,* 507 U.S. at 225-226, 113 S.Ct. 1190; *see also Machinists v. Wisconsin Employment Relations Comm'n,* 427 U.S. 132, 138, 96 S.Ct. 2548, 49 L.Ed.2d 396 (1976).

The NLRA § 8(c) provides, "the expressing of any views, argument, or opinion, or the dissemination thereof... shall not constitute or be evidence of an unfair labor practice... if such expression contains no threat of reprisal or force or promise of benefit." 29 U.S.C. § 158(c). The Supreme Court has held "the enactment of § 8(c) manifests a congressional intent to encourage free debate on issues dividing labor and management." *Linn v. United Plant*

Guard Workers of America, Local 114, 383 U.S. 53, 62, 86 S.Ct. 657, 15 L.Ed.2d 582 (1966).

AB 1889 would prevent this free debate. AB 1889 defines "assist, promote or deter union organizing" to mean "any attempt by an employer to influence the decision of its employees" relating to labor organizations. Gov.Code § 16645(a). The parties do not dispute this definition includes attempts by the employer to influence employee decisions through speech. The parties also do not dispute AB 1889 prohibits such speech while the employer is being compensated with state funds or while the employer is on state property. AB 1889 is preempted because it regulates employer speech about union organizing under specified circumstances, even though Congress intended free debate.

Defendants and Intervenors argue *Machinists* is inapplicable here because the state is merely controlling the use of state funds, and is acting in a proprietary capacity as a "market participant." *See Boston Harbor, supra*, at 229, 113 S.Ct. 1190 (holding *Machinists* preemption apply only when the state acts as a regulator rather than as a "market participant with no interest in setting policy").

In *Boston Harbor*, the Supreme Court held the NLRA did not preempt enforcement by the Massachusetts Water Resources Authority, acting as owner of a construction project, of an otherwise lawful prehire collective-bargaining agreement negotiated by private parties. *Id.* at 232, 113 S.Ct. 1190. Unlike the challenged enforcement action in *Boston Harbor*, AB 1889 is not "specifically tailored to one particular job." *Id.*

AB 1889 is a regulatory statute similar to the Wisconsin statute debarring repeat offenders of the NLRA from doing business with the state, held to be preempted by the NLRA in *Wisconsin Dept. of Industry v. Gould*, 475 U.S. 282, 287, 106 S.Ct. 1057, 89 L.Ed.2d 223 (1986). The Court rejected Wisconsin's contention the statutory scheme escapes preemption because "it is an exercise of the State's spending

power rather than its regulatory power," and focused instead on the "rigid and undiscriminating manner in which the statute operates." *Id.* In the Ninth Circuit, regulation for purposes of preemption law includes "traditional enactment of laws, ordinances, rules, and other legislative and administrative measures." *Alameda Newspapers, Inc. v. City of Oakland,* 95 F.3d 1406, 1413 (9 Cir.1996).[5] AB 1889 is a traditional legislative enactment, not a proprietary act.

It is true Congress has imposed similar restrictions as AB 1889 imposes. Intervenors cite three federal statutes restricting the use of particular federal program funds to "assist, promote, or deter union organizing."[6] *See* 29 U.S.C. § 2931(b)(7) ("Each recipient of funds under [the Workforce Investment Act] shall provide to the Secretary assurances that none of such funds will be used to assist, promote, or deter union organizing."); 42 U.S.C. § 9839(e) ("Funds appropriated to carry out [the Head Start Programs Act] shall not be used to assist, promote, or deter union organizing."); 42 U.S.C. § 12634(b)(1) ("Assistance provided under [the National Community Service Act] shall not be used by program participants and program staff to assist, promote, or deter union organizing."). Such restrictions may show Congress approves of federal restrictions in those areas, but that is not inconsistent with the doctrine of preemption. If anything, it supports the view that Congress intended to

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[5] The recent D.C. Circuit decision cited by Defendants, *Building & Construction Trades Dept., AFL-CIO v. Allbaugh,* 295 F.3d 28, 35 (D.C.Cir.2002) (upholding Executive Order affecting specific contracts in federally-funded construction contracts, reasoning the government is acting in a proprietary capacity when it controls the use of its funds), is not controlling.

[6] The fourth statute cited by Intervenors, 29 U.S.C. § 1553(c)(1), was repealed in 1998. Pub.L. 105-220, Title I, § 199(b)(2), Aug. 7, 1998, 112 Stat. 1059.

regulate the field, and Congress, rather than the states, will impose the restrictions if they are to be imposed.[7]

III. DISPOSITION

Except for Gov.Code § 16645.1, 16645.3, 16645.4, and § 16645.6, Plaintiffs' motion for summary judgment that the remaining provisions of AB 1889 are preempted by the NLRA is GRANTED.[8]

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[7] The express Congressional approval of state provisions in *De Veau v. Braisted*, 363 U.S. 144, 80 S.Ct. 1146, 4 L.Ed.2d 1109 (1960), is distinguishable from this case.

[8] AB 1889 contains a severability clause providing If any section or portion of this chapter. . .is held invalid . . . that invalidity shall not [a]ffect any other section. Gov.Code § 16649. The Court does not decide whether AB 1889 is preempted by the Labor Management Reporting and Disclosure Act or the Medicare and Medicaid Act, whether AB 1889 violates the federal Constitution, or whether declaratory or injunctive relief would be appropriate.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 03-55166

CHAMBER OF COMMERCE OF THE UNITED STATES; CALIFORNIA CHAMBER OF COMMERCE; EMPLOYERS GROUP; CALIFORNIA HEALTHCARE ASSOCIATION; CALIFORNIA MANUFACTURERS AND TECHNOLOGY ASSN.; CALIFORNIA ASSOCIATION OF HEALTH FACILITIES; CALIFORNIA ASSOCIATION OF HOME & SERVICES FOR THE AGING; BETTEC CORPORATION; MARKSHERM CORPORATION; ZILACO INC., ZILACO; DEL RIO HEALTHCARE, INC.; BEVERLY HEALTH & REHABILITATION SERVICES, INC. DBA BEVERLY MANOR COSTA MESA; INTERNEXT GROUP,
Plaintiffs-Appellees,

CALIFORNIA LABOR FEDERATION, AFL-CIO; AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS,
Intervenors-Appellants,

v.

BILL LOCKYER, ATTORNEY GENERAL, IN HIS CAPACITY AS ATTORNEY GENERAL OF THE STATE OF CALIFORNIA; DEPARTMENT OF HEALTH SERVICES; FRANK G. VANACORE, AS THE CHIEF OF THE AUDIT REVIEW AND ANALYSIS SECTION OF THE CALIFORNIA DEPARTMENT OF HEALTH SERVICES; DIANA M. BONTA, R.N., DR., PH.D, AS THE DIRECTOR OF THE CALIFORNIA DEPARTMENT OF HEALTH SERVICES,
Defendants.

No. 03-55169

CHAMBER OF COMMERCE OF THE UNITED STATES; CALIFORNIA CHAMBER OF COMMERCE; EMPLOYERS GROUP; CALIFORNIA HEALTHCARE ASSOCIATION; CALIFORNIA MANUFACTURERS AND TECHNOLOGY ASSN.; CALIFORNIA ASSOCIATION OF HEALTH FACILITIES; CALIFORNIA ASSOCIATION OF HOME & SERVICES FOR THE AGING; BETTEC

CORPORATION; MARKSHERM CORPORATION; ZILACO INC., ZILACO; DEL RIO HEALTHCARE, INC.; BEVERLY HEALTH & REHABILITATION SERVICES, INC. DBA BEVERLY MANOR COSTA MESA; INTERNEXT GROUP,
Plaintiffs-Appellees,

and

CALIFORNIA LABOR FEDERATION, AFL-CIO; AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS,
Intervenors-Appellants,

v.

BILL LOCKYER, ATTORNEY GENERAL, IN HIS CAPACITY AS ATTORNEY GENERAL OF THE STATE OF CALIFORNIA; DEPARTMENT OF HEALTH SERVICES; FRANK G. VANACORE, AS THE CHIEF OF THE AUDIT REVIEW AND ANALYSIS SECTION OF THE CALIFORNIA DEPARTMENT OF HEALTH SERVICES; DIANA M. BONTA, R.N., DR., PH.D, AS THE DIRECTOR OF THE CALIFORNIA DEPARTMENT OF HEALTH SERVICES,
Defendants-Appellants.

ORDER

Filed November 20, 2006.

Before SCHROEDER, Chief Judge, REINHARDT, BEEZER, KOZINSKI,. KLEINFELD, HAWKINS, THOMAS, SILVERMAN, McKEOWN, WARDLAW, FISHER, PAEZ, RAWLINSON, CLIFTON and CALLAHAN, Circuit Judges.

Plaintiffs-Appellees' motion to stay the mandate, filed October 6, 2006, is **GRANTED**, Fed. R. App. P. 41(b).

The mandate is stayed pending the filing of a petition for writ of certiorari in the Supreme Court. The stay expires ninety (90) days from the date of this order unless Plaintiffs-Appellees file a petition for the writ and so notify the Clerk

of this court in writing within the period of the stay. In that case, the stay shall continue until final disposition by the Supreme Court.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 03-55166

CHAMBER OF COMMERCE OF THE UNITED STATES; CALIFORNIA CHAMBER OF COMMERCE; EMPLOYERS GROUP; CALIFORNIA HEALTHCARE ASSOCIATION; CALIFORNIA MANUFACTURERS AND TECHNOLOGY ASSN.; CALIFORNIA ASSOCIATION OF HEALTH FACILITIES, CALIFORNIA ASSOCIATION OF HOME & SERVICES FOR THE AGING; BETTEC CORPORATION; MARKSHERM CORPORATION; ZILACO INC., ZILACO; DEL RIO HEALTHCARE, INC.; BEVERLY HEALTH & REHABILITATION SERVICES, INC. DBA BEVERLY MANOR COSTA MESA; INTERNEXT GROUP,
Plaintiffs-Appellees,

CALIFORNIA LABOR FEDERATION, AFL-CIO; AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS,
Intervenors-Appellants,

v.

BILL LOCKYER, ATTORNEY GENERAL, IN HIS CAPACITY AS ATTORNEY GENERAL OF THE STATE OF CALIFORNIA; DEPARTMENT OF HEALTH SERVICES; FRANK G. VANACORE, AS THE CHIEF OF THE AUDIT REVIEW AND ANALYSIS SECTION OF THE CALIFORNIA DEPARTMENT OF HEALTH SERVICES; DIANA M. BONTA, R.N., DR., PH.D, AS THE DIRECTOR OF THE CALIFORNIA DEPARTMENT OF HEALTH SERVICES,
Defendants.

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CORPORATION; MARKSHERM CORPORATION; ZILACO INC., ZILACO; DEL RIO HEALTHCARE, INC.; BEVERLY HEALTH & REHABILITATION SERVICES, INC. DBA BEVERLY MANOR COSTA MESA; INTERNEXT GROUP,
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and

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Defendants-Appellants.

Filed February 9, 2006

Before: SCHROEDER, Chief Judge.

ORDER

Upon the vote of a majority of the en banc court, the opinion and dissent filed on September 6, 2005, slip op. 12167, and appearing at 422 F.3d 974 (9th Cir. 2005), are withdrawn.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 03-55166

CHAMBER OF COMMERCE OF THE UNITED STATES; CALIFORNIA CHAMBER OF COMMERCE; EMPLOYERS GROUP; CALIFORNIA HEALTHCARE ASSOCIATION; CALIFORNIA MANUFACTURERS AND TECHNOLOGY ASSN.; CALIFORNIA ASSOCIATION OF HEALTH FACILITIES; CALIFORNIA ASSOCIATION OF HOME & SERVICES FOR THE AGING; BETTEC CORPORATION; MARKSHERM CORPORATION; ZILACO INC., ZILACO; DEL RIO HEALTHCARE, INC.; BEVERLY HEALTH & REHABILITATION SERVICES, INC. DBA BEVERLY MANOR COSTA MESA; INTERNEXT GROUP,
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Defendants-Appellants.

Filed January 17, 2006

Before SHROEDER, Chief Judge.

ORDER

Upon the vote of a majority of nonrecused regular active judges of this court,[1] it is ordered that this case be reheard by the en banc court pursuant to Circuit Rule 35-3. The three-judge panel opinion shall not be cited as precedent by or to this court or any district court of the Ninth Circuit, except to the extent adopted by the en banc court.

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[1] Judge Berzon is recused.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 03-55166

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Defendants-Appellants.

Filed May 13, 2005.

Before BEEZER and FISHER, Circuit Judges, and ENGLAND, District Judge.*

ORDER

The Petition for Panel Rehearing is GRANTED, and the case shall be resubmitted as of the date of this order, without additional oral argument. The panel's opinion is withdrawn and shall not be cited as precedent by or to this court or any district court of the Ninth Circuit, except to the extent adopted by the panel upon rehearing.

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* The Honorable Morrison C. England, United States District Judge for the Eastern District of California, sitting by designation.

United States Constitution, Article VI, Clause 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding.

National Labor Relations Act, 29 U.S.C. § 158(c)

(c) Expression of views without threat of reprisal or force or promise of benefit

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

California Assembly Bill 1889, Cal. Gov't Code § 1645-1649

§ 16645. Definitions

For purposes of this chapter, the following terms have the following meanings:

(a) "Assist, promote, or deter union organizing" means any attempt by an employer to influence the decision of its employees in this state or those of its subcontractors regarding either of the following:

(1) Whether to support or oppose a labor organization that represents or seeks to represent those employees.

(2) Whether to become a member of any labor organization.

(b) "Employer" means any individual, corporation, unincorporated association, partnership, government agency or body, or other legal entity that employs more than one person in the state.

(c) "State contractor" means any employer that receives state funds for supplying goods or services pursuant to a written contract with the state or any of its agencies. "State contractor" includes an employer that receives state funds pursuant to a contract specified in paragraph (2) of subdivision (d). For purposes of this chapter, the contract shall be deemed to be a contract with a state agency.

(d)(1) "State funds" means any money drawn from the State Treasury or any special or trust fund of the state.

(2) "State funds" includes any money appropriated by the state and transferred to any public agency, including a special district, that is used by the public agency to fund, in whole or in part, a service contract in excess of two hundred fifty thousand dollars ($250,000).

(e) "State property" means any property or facility owned or leased by the state or any state agency.

§ 16645.1. Prohibition; requests for reimbursements; records; violations; penalties

(a) No state funds shall be used to reimburse a state contractor for any costs incurred to assist, promote, or deter union organizing.

(b) Every request for reimbursement from state funds by a state contractor shall include a certification that the contractor is not seeking reimbursement for costs incurred to assist, promote, or deter union organizing. A state contractor that incurs costs to assist, promote, or deter union organizing shall maintain records sufficient to show that no reimbursement from state funds has been sought for those costs. The state contractor shall provide those records to the Attorney General upon request.

(c) A state contractor is liable to the state for the amount of any funds obtained in violation of subdivision (a) plus a civil penalty equal to twice the amount of those funds.

(d) This section does not apply to a fixed-price contract or to any other arrangement by which the amount of the payment of state funds does not depend on the costs incurred by the state contractor.

§ 16645.2. Grant recipients; accounting for use of state funds; violations; penalties

(a) The recipient of a grant of state funds, including state funds disbursed as a grant by a public agency, shall not use the funds to assist, promote, or deter union organizing.

(b) For purposes of this section, each recipient of a grant of state funds shall account for those funds as follows:

(1) State funds designated by the grantor for use for a specific expenditure of the recipient shall be accounted for as allocated to that expenditure.

(2) State funds that are not designated as described in paragraph (1) shall be allocated on a pro rata basis to all expenditures by the recipient that support the program for which the grant is made.

(c) Prior to the disbursement of a grant of state funds, the recipient shall provide a certification to the state that none of the funds will be used to assist, promote, or deter union organizing. Any recipient that makes expenditures to assist, promote, or deter union organizing shall maintain records sufficient to show that state funds have not been used for those expenditures. The grant recipient shall provide those records to the Attorney General upon request.

(d) A grant recipient is liable to the state for the amount of any funds expended in violation of subdivision (a) plus a civil penalty equal to twice the amount of those funds.

§ 16645.3. State contractors; prohibitions; service contracts for state or state agencies; violations; penalties

(a) No state contractor shall assist, promote, or deter union organizing by employees who are performing work on a service contract, including a public works contract, for the state or a state agency.

(b) A state contractor that violates subdivision (a) is liable for a civil penalty of one thousand dollars ($1,000) per employee per violation.

§ 16645.4. State contractors in receipt of state funds in excess of a certain amount pursuant to contracts with state or state agencies; prohibition; records; violations; penalties

(a) A state contractor that receives state funds in excess of fifty thousand dollars ($50,000) pursuant to a contract with the state or a state agency shall not use those state funds to assist, promote, or deter union organizing during the life of the contract, including any extensions or renewals of the contract. The dollar threshold in this subdivision, however, does not limit the application of other provisions of this chapter that restrict the use of state funds.

(b) All contracts in excess of fifty thousand dollars ($50,000) and that are awarded by the state or a state agency shall contain the prohibition stated in subdivision (a).

(c) A state contractor who is subject to subdivision (a) and who makes expenditures to assist, promote, or deter union organizing shall maintain records sufficient to show that no state funds were used for those expenditures. The state contractor shall provide those records to the Attorney General upon request.

(d) A state contractor is liable to the state for the amount of any funds expended made in violation of subdivision (a) plus a civil penalty equal to twice the amount of those funds.

§ 16645.5. Employers conducting business on state property pursuant to contracts or concession agreements; meeting prohibitions; violations; penalties

(a) An employer conducting business on state property pursuant to a contract or concession agreement with the state or a state agency, or a subcontractor on such a contract or agreement, shall not use state property to hold a meeting with any employees or supervisors if the purpose of the meeting is to assist, promote, or deter union organizing. This section does not apply if the state property is equally available, without charge, to the general public for holding a meeting.

(b) An employer that violates subdivision (a) shall be liable to the state for a civil penalty equal to one thousand dollars ($1,000) per employee per meeting.

§ 16645.6. Public employers receiving state funds; prohibition; violations

(a) A public employer receiving state funds shall not use any of those funds to assist, promote, or deter union organizing.

(b) Any public official who knowingly authorizes the use of state funds in violation of subdivision (a) shall be liable to the state for the amount of those funds.

§ 16645.7. Private employers receiving state funds in excess of a certain amount; certification requirements; records; violations; penalties

(a) A private employer receiving state funds in excess of ten thousand dollars ($10,000) in any calendar year on account of its participation in a state program shall not use any of those funds to assist, promote, or deter union organizing.

(b) As a condition of participating in a state program pursuant to which it will receive state funds in excess of ten thousand dollars ($10,000) in any calendar year, a private employer shall provide a certification to the state that none of those funds will be used to assist, promote, or deter union organizing.

(c) A private employer who is subject to subdivision (a) and who makes expenditures to assist, promote, or deter union organizing shall maintain records sufficient to show that no state funds were used for those expenditures. The private employer shall provide those records to the Attorney General upon request.

(d) A private employer is liable to the state for any funds expended in violation of subdivision (a) plus a civil penalty equal to twice the amount of those funds.

§ 16645.8. Prosecution of civil actions; notice requirements; intervention; attorney's fees and costs

(a) A civil action for a violation of this chapter may be brought by the Attorney General, or by any state taxpayer, on behalf of the people of the State of California, for injunctive relief, damages, civil penalties, and other appropriate equitable relief. All damages and civil penalties collected pursuant to this chapter shall be paid to the State Treasury.

(b) Before filing an action under this section, a taxpayer shall give written notice to the Attorney General of the alleged violation and the intent to bring suit. If the Attorney General commences a civil action for the same alleged violation

within 60 days of receiving the notice, a separate action by the taxpayer shall be barred.

(c) A taxpayer may intervene as a plaintiff in any action brought under this section.

(d) A prevailing plaintiff in any action under this section is entitled to recover reasonable attorney's fees and costs. A prevailing taxpayer intervenor who makes a substantial contribution to an action under this section is entitled to recover reasonable attorney's fees and costs.

§ 16646. Treatment of expenditures; accounting for expenditures

(a) For purposes of this chapter, any expense, including legal and consulting fees and salaries of supervisors and employees, incurred for research for, or preparation, planning, or coordination of, or carrying out, an activity to assist, promote, or deter union organizing shall be treated as paid or incurred for that activity.

(b) For purposes of accounting for expenditures, if state funds and other funds are commingled, any expenditures to assist, promote, or deter union organizing shall be allocated between state funds and other funds on a pro rata basis.

§ 16647. Exemptions

This chapter does not apply to an activity performed, or to an expense incurred, in connection with any of the following:

(a) Addressing a grievance or negotiating or administering a collective bargaining agreement.

(b) Allowing a labor organization or its representatives access to the employer's facilities or property.

(c) Performing an activity required by federal or state law or by a collective bargaining agreement.

(d) Negotiating, entering into, or carrying out a voluntary recognition agreement with a labor organization.

§ 16648. Retroactive application

This chapter does not apply to an expenditure made prior to January 1, 2001, or to a grant or contract awarded prior to January 1, 2001, unless the grant or contract is modified, extended, or renewed after January 1, 2001. Nothing in this chapter requires employers to maintain records in any particular form.

§ 16649. Severability

The provisions of this chapter are severable. If any section or portion of this chapter, or any application thereof, is held invalid, in whole or in part, that invalidity shall not effect any other section, portion, or application that can be given effect.

No. 06-939

FILED

MAR 9 - 2007

OF THE CLER
SUPREME COURT, U.S

In The Supreme Court of the United States

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, ET AL.,

Petitioners,

v.

EDMUND G. BROWN JR., in his capacity as Attorney General of the State of California, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

EDMUND G. BROWN JR.
Attorney General of the State of California
THOMAS J. GREENE
Chief Assistant Attorney General
MANUEL M. MEDEIROS
State Solicitor General
LOUIS VERDUGO, JR.
Senior Assistant Attorney General
GORDON BURNS
Deputy Solicitor General
RICHARD T. WALDOW
Supervising Deputy Attorney General
ANGELA SIERRA
Supervising Deputy Attorney General
State Bar No. 126374
(Counsel of Record)

300 South Spring Street
Los Angeles, CA 90013
Telephone: (213) 620-6312
Fax: (213) 897-7605

Counsel for Respondents Edmund G. Brown Jr., as the Attorney General of the State of California, the California Department of Health Services, Frank G. Vanacore as the Chief of the Audit Review and Analysis Section of the California Department of Health Services, and Diana M. Bonta, R.N., Dr. P.H. as the Director of the California Department of Health Services, by her successor in that capacity, Sandra Shewry

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether California Government Code sections 16645.2 and 16645.7, which prohibit state grant and program fund recipients from using those state funds "to assist, promote, or deter union organizing," but place no restrictions on the recipients' use of other funds, are preempted by the National Labor Relations Act, 29 U.S.C. §§ 151-169.

PARTIES TO THE PROCEEDINGS

Respondents accept the listing of the Parties to the Proceedings set forth in the Petition for a Writ of Certiorari except that respondent Bill Lockyer, Attorney General, in his capacity as Attorney General of the State of California appears by his successor in that capacity, Edmund G. Brown Jr., and respondent Diana M. Bonta, R.N., Dr. P.H. as the Director of the California Department of Health Services, appears by her successor in that capacity, Sandra Shewry.

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BRIEF IN OPPOSITION

SUMMARY OF ARGUMENT

At issue is a 12-3 en banc panel decision of the United States Court of Appeals for the Ninth Circuit holding that the National Labor Relations Act, 29 U.S.C. §§ 151-169 (NLRA) does not deprive California of its authority, reserved to the states by the Tenth Amendment, to prohibit recipients of state grant or program funds from using those state funds to support or oppose union organizing. Respondents submit that certiorari review is unwarranted as petitioners have failed to satisfy any of this Court's grounds for granting their petition.

First, there is no conflict among the circuits as to the actual holding reached by the en banc panel. The recent Second Circuit opinion on which petitioners heavily rely in seeking certiorari review, *Healthcare Ass'n of N.Y. State, Inc. v. Pataki*, 471 F.3d 87 (2d Cir. 2006), *pet'n for rehearing pending* (hereinafter *Healthcare Ass'n*), is the only other circuit to address an NLRA preemption challenge to a similar statute. Consistent with the Ninth Circuit's decision, the Second Circuit in *Healthcare Ass'n* held that the New York statute at issue was *not* preempted by the NLRA as applied to state grant funding. Further, reasoning that other applications of the New York statute (some of which appear analogous to California's program fund provisions) may or may not be preempted depending on future development of the record, the Second Circuit remanded the case for further fact-finding and proceedings. That remand was entirely consistent with the Ninth Circuit's ruling, as against a facial challenge, that California's law is not preempted with respect to program funds. The Ninth Circuit, like the Second Circuit, has left for another day the issue of whether spending restrictions

might be preempted as applied to specific forms of state program funding. *See* Appendix to Petition for a Writ of Certiorari (Pet. App.) 34a (explaining that appeal involved a facial challenge).

Second, this case's current procedural posture renders it a poor vehicle to address the legal issues raised by petitioners. This case arises from the district court's grant of a partial summary judgment only. There are a number of issues that remain to be resolved on remand, including petitioners' challenge to provisions of the California law that prohibit recipients of certain state *contract* funds from using those funds to support or oppose union organizing. *See* Cal. Gov't Code §§ 16645.1, 16645.3, 16645.4.

Moreover, the record is devoid of any factual findings, other than as to petitioners' standing to challenge the California law's grant and program provisions, and there remain disputes that have yet to be adjudicated about the proper interpretation of those provisions of the state law that were the subject of the district court's decision.

Third, petitioners note that legislation similar to AB 1889 has been proposed in 15 other states. Such legislation, if enacted, could well result in the First, Third, Fifth, Seventh, Eighth and Eleventh Circuits, in addition to the Second and Ninth Circuits, issuing decisions that are directly relevant to petitioners' arguments. Thus, rather than stepping in prematurely to grant certiorari on a case that presents a facial challenge only, this Court should allow the issues to more sufficiently percolate in the lower courts and wait to see if a conflict among the circuits in fact develops, and if so, the Court could select a case for review that has a far more developed factual record than provided in this case.

Finally, the Ninth Circuit's en banc decision, joined by 12 judges, is well-reasoned, does not conflict with Supreme Court precedent and is entirely correct.

For all these reasons, respondents submit that this Court should deny certiorari.

STATEMENT OF THE CASE

1. Overview of the California Law

AB 1889, Cal. Gov't Code §§ 16645-16649, enacted by the California legislature in 2000, prohibits employers from using certain state funds and facilities for the purpose of supporting or opposing unionization. 2000 Cal. Stat., Ch. 872. The core components of AB 1889 at issue in this petition are the statute's prohibition against an employer's use of state grant or program funds "to assist, promote, or deter union organizing." Cal. Gov't Code §§ 16645.2, 16645.7.

AB 1889's restrictions are limited to the use of state grant and program funds, and do not prohibit recipients of those funds from spending their non-state funds on union-related activities. *See, e.g.*, Cal. Gov't Code § 16645.7(a) ("A private employer receiving state funds . . . shall not use any of *those* funds to assist, promote, or deter union organizing." (emphasis added)).

AB 1889 is not a novel law. Congress has enacted several laws with similar restrictions on the use of federal funds. For example, the Workforce Investment Act requires "[e]ach recipient of funds . . . [to] provide to the Secretary assurances that none of such funds will be used to assist, promote, or deter union organizing." 29 U.S.C.

§ 2931(b)(7); *see also* the National and Community Service Act, 42 U.S.C. § 12634(b)(1) ("Assistance provided under this subchapter shall not be used by program participants and program staff to . . . assist, promote, or deter union organizing."); and the Head Start Programs Act, 42 U.S.C. § 9839(e) (prohibiting the use of appropriated funds "to assist, promote, or deter union organizing").

AB 1889 requires employers who receive state grant or program funds to certify that those state funds will not be used to assist, promote or deter union organizing. Cal. Gov't Code §§ 16645.2(c), 16645.7(b). Recipients must also "maintain records sufficient to show that *state funds* have not been used" for those purposes and must provide those records to the Attorney General upon request. Cal. Gov't Code § 16645.2(c) (emphasis added); *see also* Cal. Gov't Code 16645.7(c). AB 1889 states that, "[f]or purposes of accounting for expenditures, if state funds and other funds are commingled, any expenditures to assist, promote, or deter union organizing shall be allocated between state funds and other funds on a pro rata basis." Cal. Gov't Code § 16646(b). However, AB 1889 expressly provides that "[n]othing in [AB 1889] requires employers to maintain records in any particular form." Cal. Gov't Code § 16648.

An employer who violates AB 1889 is liable for the amount of the state funds spent on activities supporting or opposing union organizing, a civil penalty of twice the amount of the expenditure, and reasonable attorney's fees and costs. Cal. Gov't Code §§ 16645.2(d), 16645.7(d), 16645.8(d).

2. The District Court Proceedings

Petitioners filed a motion for summary judgment requesting the district court to invalidate AB 1889 on a number of grounds, including NLRA preemption. Pet. App. 140a.

The district court granted petitioners' motion for summary judgment in part. Pet. App. 140a, 149a. The court concluded that petitioners had not yet established standing to challenge any provision of AB 1889 other than California Government Code sections 16645.2 and 16645.7, which apply to state grant and program funds. Pet. App. 142a-144a; Joint Excerpt of Record for Defendants-Appellants and Intervenors-Appellants filed with the Ninth Circuit (ER) 271-272. The district court then ruled that Sections 16645.2 and 16645.7 are "preempted [by the NLRA] because [they] regulate[] employer speech about union organizing under specified circumstances, even though Congress intended free debate." Pet. App. 147a.

Other than those facts related to plaintiffs' standing, the district court's summary judgment decision did not identify any facts that the court had determined to be undisputed. Pet. App. 140a-149a.

After granting summary judgment in part, the district court entered a partial final judgment pursuant to Federal Rule of Civil Procedure 54(b) declaring California Government Code sections 16645.2 and 16645.7 "invalid as applied to employers covered by the [NLRA]" and enjoined respondents from enforcing those provisions. ER 259-260, 272. The court stayed the remaining portions of the case pending appeal. ER 272-273.

3. Decision of the Court of Appeals

The Ninth Circuit initially issued a panel opinion affirming the district court. On rehearing, the court withdrew that decision and issued a new opinion, again affirming the district court, but this time with a dissent. The Ninth Circuit then reheard the case en banc. The en banc court issued a 12-3 decision that reversed the district court's grant of partial summary judgment and remanded the case for further proceedings consistent with its opinion. Pet. App. 2a, 36a.

The en banc court first explained that a facial challenge to legislation is "'the most difficult challenge to mount successfully, since *the challenger must establish that no set of circumstances exists under which the Act would be valid.*'" Pet. App. 7a (*quoting Rust v. Sullivan*, 500 U.S. 173, 183 (1991), emphasis added). Then, after determining that AB 1889's grant and program provisions do not fall within the "market participant exception" to NLRA preemption (Pet. App. 11a-12a), the en banc panel held that AB 1889's grant and program provisions are not preempted under the "*Machinists*" or "*Garmon*" preemption doctrines, doctrines established by this Court in, respectively, *Lodge 76, International Ass'n of Machinists v. Wisconsin Employment Relations Commission* (*Machinists*), 427 U.S. 132 (1976) and *San Diego Building Trades Council v. Garmon* (*Garmon*), 359 U.S. 236 (1959). Pet. App. 12a-13a, 36a.

Central to the en banc court's analysis and holding is the distinction between restrictions on "the *use* of state funds," which do not preclude the recipient from using its own funds to engage in activities the state does not wish to subsidize, and conditions upon "the *receipt* of state funds,"

such as requiring recipients to remain neutral in union organizing disputes as a condition of receiving state money. Pet. App. 17a. The court recognized that the AB 1889 provisions fall within the former category. *Id.*

Accordingly, the en banc panel determined that AB 1889's grant and program provisions are not preempted under *Machinists*, as that doctrine "requires the preemption of any state regulation of activity that, although not directly regulated by the NLRA, was intended by Congress 'to be controlled by the free play of economic forces,' . . . in a 'zone free from all regulations, whether state or federal.'" Pet. App. 13a, *quoting Machinists*, 427 U.S. at 140 and *Building & Constr. Trades Council v. Associated Builders & Contractors* (*Boston Harbor*), 507 U.S. 218, 226 (1993). As the en banc panel explained, it is "implausible" that Congress would have intended the use of state grant and program funds to be left to the free play of economic forces, "when the state's choices of how to spend its funds are by definition not controlled by the free play of economic forces." Pet. App. 16a-17a.

The en banc court also reasoned that the very similar restrictions on the use of federal government funds adopted by Congress, (*see* this Opposition at pp. 3-4), are inconsistent with the view that California is regulating "'conduct intended to be unregulated.'" Pet. App. 21a (*quoting Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 614 (1986)).

With respect to *Garmon*, the Ninth Circuit held that California's law does not interfere with employer speech rights protected by 29 U.S.C. § 158(c) (section 8(c)) of the

NLRA.[1] Pet. App. 23a-25a. The en banc court reasoned that section 8(c) "does not *grant* employers speech rights" in the sense necessary for *Garmon* preemption; rather, as the plain words of the NLRA indicate, that statute "simply prohibits their noncoercive speech from being used as evidence of an unfair labor practice." Pet. App. 23a.

The en banc panel observed that section 8(c) "'merely implements the First Amendment,'" (Pet. App. 23a, *quoting NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969)), and correctly applied Supreme Court First Amendment precedent, which permits restrictions upon the use of government funds so long as "employers remain free to use their own funds to advocate for or against unionization and are not required to accept neutrality as a condition for receipt of state grant and program funds." Pet. App. 25a (*citing Regan v. Taxation with Representation*, 461 U.S. 540, 549 (1983); *Rust v. Sullivan*, 500 U.S. at 193; *Cammarano v. United States*, 358 U.S. 498, 513 (1959)).

The en banc panel further concluded that AB 1889's grant and program provisions do not intrude on an area that was "arguably – but not definitely – prohibited or protected" by the NLRA. Pet. App. 25a (*citing Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters* (*Sears*), 436 U.S. 180, 188 (1978)); Pet. App. 32a. The en banc panel recognized that under AB 1889, a California state court "would determine only whether an employer used state grant or program funds to influence employees, not whether that attempt violated the NLRA."

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[1] Section 8(c) provides that,"[t]he expressing of any views . . . shall not constitute or be evidence of an unfair labor practice under any of the provisions of [the NLRA], if such expression contains no threat of reprisal or force or promise of benefit." 29 U.S.C. § 158(c).

Pet. App. 28a. The majority thus concluded that there is neither a sufficient identity of issues nor a risk that a state tribunal, while applying state law, could misinterpret federal law to warrant preemption under the *Sears* criteria. Pet. App. 28a-29a.

The en banc court also determined that AB 1889 would fall within the *Garmon* exception for the regulation of "'interests . . . deeply rooted in local feeling and responsibility.'" Pet. App. 30a (*quoting Garmon*, 359 U.S. at 243-44). The court reasoned that "a state's effort to ensure that those who accept its grant and program funds use them for the purpose for which they were given . . . is of at least as great a concern to the state as its power to regulate" in other areas held to fall within this exception. Pet. App. 31a (footnotes omitted).

Three dissenting judges would have held AB 1889 to be preempted under both the *Garmon* and *Machinists* doctrines on the ground that it "stifles employers from fully participating in organizing and exercising the rights that are explicitly granted to them by Congress under the NLRA." Pet. App. 36a. In reaching this conclusion, the dissenters interpreted the state statute to "co-opt[] the payment for goods and services and profit realized under a contract." Pet. App. 36a. The 12-judge majority rejected this interpretation, pointing out that the appeal involved a facial challenge only, and further, the contract provisions of AB 1889 were not before the court. Pet. App. 34a & n. 22.

The majority also noted that respondents had acknowledged that the law's restrictions would *not* apply to employers' own funds, including, for example, "legitimately distributed corporate dividend[s]" reinvested in the corporate entity, which the court recognized were, "itself,

the fruit of the receipt of state grant or program funds." Pet. App. 32a n. 20. The majority further observed that "[t]he dissent also disregard[ed] the nature of state programs, which are run to serve public purposes and need not guarantee a profit to private companies." Pet. App. 35a n. 23.

REASONS FOR DENYING THE PETITION

I. CERTIORARI IS NOT WARRANTED BECAUSE THERE IS NO CONFLICT AMONG THE CIRCUITS AS TO THE HOLDING REACHED BY THE NINTH CIRCUIT

1. The Holdings of the Ninth and Second Circuits Are Not in Conflict

Petitioners' contention that there is a sufficient conflict between the Ninth Circuit's decision and that of the Second Circuit in *Healthcare Ass'n*, 471 F.3d 87 to warrant this Court's review is without merit.[2]

At issue in *Healthcare Ass'n* was New York Labor Law section 211-a (section 211-a) which provides, in relevant part, that "no monies appropriated by the state for any purpose shall be used or made available to employers" to pay for activities to "encourage or discourage union organization," including, among other expenditures, the hiring of consultants for those purposes. *Healthcare Ass'n*, 471 F.3d at 90-91.

[2] On February 16, 2007, the Second Circuit directed the plaintiffs to file a response to defendants' petition for rehearing by March 18, 2007.

The Second Circuit did *not* hold that section 211-a is preempted. Nor did it hold that section 211-a is preempted as to "cost-based" obligations, the context that appears most analogous to AB 1889's program provision. Rather, the court held that the law is not preempted as applied to grants and remanded the case back to the district court for the development of a further factual record as to other forms of government funding. *Healthcare Ass'n* at 103-105, 109. In remanding the matter, the Second Circuit explained that, *"[t]o the extent* that the State applies section 211-a to burden the use of money that cannot be considered State funds, it burdens NLRA speech and satisfies the threshold conditions for *Garmon* preemption." *Id.* at 106 (emphasis added).

With respect to the remand, the Second Circuit reasoned that whether the New York law is preempted as applied to particular state expenditures that New York contends are "cost-based," such as New York's health care program, cannot be resolved without consideration of a number of factual issues: whether union-related spending affects the State's costs, whether the State has another feasible way to avoid such expenses, such as designating such costs as non-reimbursable, and whether the State has other feasible mechanisms to protect its interest in obtaining quality services with its funds. *Healthcare Ass'n*, 471 F.3d at 103-105, 109.[3]

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[3] Accordingly, contrary to petitioners' contention, the Second Circuit did *not* hold that the New York law is preempted as applied to "reimbursement for providing health care." Pet. 16. Nor did *either* the Ninth or Second Circuit decide that "the state's programmatic costs [for health care] cannot possibly increase by virtue of the employer's union-related expenditures." *Id.*

The Second Circuit further held that the determination as to whether the New York law is preempted under the *Machinists* doctrine "will depend on the same factors [the court] identified as determinative" in its *Garmon* preemption analysis. *Healthcare Ass'n*, 471 F.3d at 108.

Petitioners contend that *Healthcare Ass'n* conflicts with the en banc decision for essentially two reasons, a difference in analysis with respect to section 8(c) of the NLRA and a purported difference in treatment of state restrictions on "earned" money. Pet. 12-16. Petitioners' contention is without merit.

To be sure, the Second Circuit majority reasoned that section 8(c) renders certain employer speech "protected" in the sense that can trigger *Garmon* preemption. The Ninth Circuit reasoned otherwise. *Compare Healthcare Ass'n*, 471 F.3d at 97, 99-100, with Pet. App. 23a-25a. At this early stage, this difference in reasoning may turn out to be merely academic because the outcome in both cases, after remand, may be the same.

In fact, despite the differing analyses of section 8(c) with respect to *Garmon*, both circuits analyzed their respective state laws under the "arguably protected or prohibited" *Garmon* test set forth by this Court in *Sears*, 436 U.S. at 188. *Healthcare Ass'n*, 471 F.3d at 100-102; Pet. App. 25a-29a. And, the Second Circuit, consistent with the Ninth Circuit, concluded that the NLRA does *not* preempt restrictions on the use of money that *can* "be considered State funds," such as state grant money. *Healthcare Ass'n*, 471 F.3d at 102-103, 105 ("We conclude that, to the extent that *section* 211-a functions as a restriction on what use may be made of State grants, it is not preempted by *Garmon*.").

As for the New York law's application to cost-based obligations, the Second Circuit remanded the case to the district court for further factual development as explained above. In contrast, all that the Ninth Circuit held was that, on a facial challenge, AB 1889's restriction on state grant and program funds is not preempted by the NLRA. It remanded the matter to the district court for further proceedings. That the Ninth Circuit did not opine on the factors that may be relevant to as-applied challenges to particular programs that are subject to AB 1889 does not create a conflict between the two circuits. While it is possible that the two circuits may issue decisions that are in conflict following their review of remand proceedings, their decisions that are the subject of this petition are not.

Nor, as the petitioners suggest, did the Ninth Circuit hold that AB 1889 would not be preempted if it were applied to funds that petitioners characterize as being "earned." In referring to "earned" money, petitioners apparently mean to suggest, incorrectly, either that the en banc panel upheld the law as applied to ordinary contracts for the purchase of goods, pursuant to which an employer delivers a specified product in return for the state's payment, or that it has upheld the law as applied to employer profits earned from grants and state programs. In fact, the en banc court expressly clarified the limited scope of the issues and record on appeal in rejecting essentially the same contention when raised by the dissent:

> The dissent's parade of horribles goes far beyond the scope of plaintiffs' facial challenge to sections 16645.2 and 16645.7 and the record before us. The district court made no findings, nor is there evidence, that AB 1889 "co-opts the payment for goods and services and profit realized under a

> contract". . . . [T]he California statute, like various federal acts, requires only that those who accept government grant and program funds use them for the purpose for which they were given.

Pet. App. 34a.

For this same reason, no conflict exists with the Second Circuit's reasoning in *Healthcare Ass'n* that a spending restriction *would* be preempted as applied to "fixed-price contracts." *Healthcare Ass'n*, 471 F.3d at 106. Indeed, the en banc court made clear that it was not reviewing portions of AB 1889 that apply to state contracts. Pet. App. 34a n. 22.

Accordingly, just as the Second and Ninth Circuits are in accord that state laws prohibiting recipients of state grant funds from using those funds to support or oppose union organizing are not preempted by the NLRA, they are in agreement that the issues of whether and to what extent those laws are preempted by the NLRA with respect to other forms of state spending should be decided on the remand proceedings, or in separate, as-applied challenges, before the district courts. On the remand of both cases, further factual development will occur and legal issues yet to be decided will be resolved for the first time. The differences in non-dispositive reasoning between these two circuit decisions do not establish sufficient grounds for certiorari review. *Cf. Miroyan v. United States*, 439 U.S. 1338, 1339 (1978) (Opn. of Rehnquist, J., denying stay) ("While there is undoubtedly a difference of approach between the Circuits on the question, I am not sure that there is a square conflict, and I am even less sure that the granting of certiorari in this case would result in the resolution of any conflict which does exist.").

2. The Holdings of the Ninth and Seventh Circuits Are Not in Conflict

Despite petitioners' contention to the contrary, (Pet. 16-17), the Ninth Circuit's decision also does not conflict with the Seventh Circuit's decision in *Metro. Milwaukee Ass'n of Commerce v. Milwaukee County*, 431 F.3d 277 (7th Cir. 2005). In that case, the Seventh Circuit considered a Milwaukee law mandating that county contractors enter into "labor peace agreements" with any union that wanted to organize employees who worked on a County contract. *Id.* at 277-278. The Seventh Circuit held that the law was preempted by the NLRA because the mandated labor peace agreements would, as a practical matter, necessarily apply to "disputes . . . *unrelated to any spending or procurement activity of the County.*" *Id.* at 279 (emphasis added). The law operated not only to limit the *funds* that contractors could use for certain activities, but to prohibit contractors from engaging in those activities *at all* with respect to their employees. *Id.* at 279-280. As the Seventh Circuit explained, "[i]t would hardly be feasible for the contractors to segregate their workforces, with one part governed by labor-peace agreements and the other not even though the two groups of workers would be doing identical work, just for different customers." *Id.* at 279.

The analogous situation would be presented here if the California law operated in such a manner as to require employers who received state grant or program funds to refrain from using their own private funds to support or oppose unionization. But the statute does not impose such a restriction; in fact, the Ninth Circuit indicated that such a hypothetical law would be preempted. Pet. App. 17a. Further, not only are there no factual findings in the record to support the contention, disputed by respondents, that AB

1889, in effect, restricts employers' use of their own funds, the fact that Congress requires similar restrictions on federal grant monies (*see* this Opposition at pp. 3-4) belies such a notion. Petitioners' reliance on *Metro. Milwaukee Ass'n of Commerce v. Milwaukee County*, 431 F.3d 277 is without merit and there is no conflict between the Ninth and Seventh Circuits.

The absence of any conflict between the Seventh and Ninth Circuits is further illustrated by Judge Easterbrook's opinion in *Northern Ill. Chapter of Associated Builders & Contractors v. Lavin*, 431 F.3d 1004, 1006-1007 (7th Cir. 2005), which held that conditioning grants for the renovation of fuel plants upon the grant recipients' entry into certain labor agreements was not preempted by the NLRA.

II. THE PROCEDURAL STATUS OF THIS CASE RENDERS IT A POOR CANDIDATE FOR CERTIORARI REVIEW

1. The En Banc Court Reviewed Only a Facial Challenge to the Grant and Program Provisions of AB 1889 and Significant Factual Disputes Have Not Yet Been Resolved

As the en banc court explained, on a facial challenge, the challengers' burden is to demonstrate that a statute cannot validly be applied under any circumstances. Pet. App. 7a (*citing Rust*, 500 U.S. at 183); *see also California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 577, 580 (1987) (to succeed in a facial preemption challenge, plaintiffs must show "there is no possible set of conditions the Coastal Commission could place on its permit that would not conflict with federal law").

Petitioners opine on how AB 1889 will be applied to participants in California's Medi-Cal program. Pet. 16. But the lower courts in this case did not evaluate AB 1889's grant and program provisions as applied to Medi-Cal or any other particular state program. Nor did the district court make any factual findings regarding how the complex Medi-Cal reimbursement program operates. *See, e.g.*, ER 60-67 (excerpts from the California Medicaid "State Plan" in effect in August 2002).

The district court also did not render factual findings as to petitioners' factual contention – disputed by respondents – that AB 1889 imposes significant compliance burdens on employers who wish to use their own funds to assist or deter unionization. *See, e.g.*, Pet. 23, 24, 26, 27. As the en banc court correctly pointed out in response to this contention, the record reflects "the absence of any finding by the district court that [the provisions at issue] are onerous," and the only expert testimony in the record (a declaration from a partner at an accounting firm) was that the law provides "employers 'flexibility in establishing proper accounting procedures and controls'" and that compliance with the statute "appear[s] to be significantly less burdensome than the detailed requirements for federal grant recipients." Pet. App. 4a-5a n. 2; *see* ER 99-10[illegible] (declaration of Nicholas Ross). Moreover, because petitioners are the parties who sought and obtained summary judgment below, on review all the disputed facts must be resolved against them. *See Cantor v. Detroit Edison Co.*, 428 U.S. 579, 582 (1976).

Petitioners cite *FEC v. Massachusetts Citizens for Life, Inc.* (*Massachusetts Citizens*), 479 U.S. 238 (1986) to suggest that California law imposes overly severe accounting compliance burdens as a matter of law. Pet. 26. But

that case involved an "as applied" challenge by a small non-profit organization that did not engage in business activities to a campaign finance law that, in the court's evaluation, had "[d]etailed record-keeping and disclosure obligations" and "impose[d] administrative costs that many small entities may be unable to bear." *Massachusetts Citizens,* 479 U.S. at 241-242, 254, 263-264.

In contrast, this case presents a facial challenge only, and, unlike the law at issue in *Massachusetts Citizens*, the California law specifies that "[n]othing in [AB 1889] requires employers to maintain records in any particular form." Cal. Gov't Code § 16648. Moreover, as this Court has recognized, record-keeping requirements applicable to government subsidies do not impermissibly burden expressive activity. Indeed, in *Massachusetts Citizens*, this Court expressly distinguished *Regan v. Taxation Without Representation,* 461 U.S. 540, 545-546, in which this Court upheld the constitutionality of a federal requirement that non-profits establish a separate lobbying entity if contributions to the corporation for the conduct of other activities were to be tax deductible. *Massachusetts Citizens,* 479 U.S. at 256 n. 9. As this Court explained, *Regan* was distinguishable since "there is no right to have speech subsidized by the Government." *Id.*

2. The En Banc Court Did Not Rule that AB 1889 Restricts the Use of Funds "Earned" by State Contractors

Central to petitioners' legal challenge is their assertion that the California law attaches restrictions to funds that state contractors have "earned," and that now belong to the contractors. *See* Pet. 15 n. 2, 16, 27. But as explained earlier (this Opposition at pp. 13-14), the en banc

court expressly rejected this contention as beyond the limited scope of the issues and record on appeal. The court had only a facial challenge before it, and, further, AB 1889's restrictions on *contract* funds were not at issue. Pet. App. 34a.

The en banc panel also specifically noted in its decision that the respondents agreed at oral argument that "the fruit of the receipt of state grant or program funds" – for example, the reinvestment of a legitimately distributed corporate dividend – would not be subject to AB 1889's restrictions. Pet. App. 32a n. 20.

Moreover, neither the court below nor any state court has ruled that an employer's bona fide *profit*, even if derived from state funds from a grant or program that allows for a profit, would be considered "state funds" under AB 1889. There is no reason to presume that the courts would adopt an unreasonable interpretation of the statute. Indeed, both the federal and California courts follow the canon of statutory construction that statutes should be construed to avoid constitutional doubts. *See Clark v. Benitez,* 543 U.S. 371, 381-382 (2005); *People v. Davenport,* 710 P.2d 861, 870 (Cal. 1985). Accordingly, it is pure speculation to conclude that AB 1889 will ultimately be interpreted to restrict employers' use of bona fide profits legitimately earned from participation in a state program.

3. The Court Would Benefit from Development of This Case on Remand and Consideration of the Legal Issues Presented by Other Circuits

Petitioners' contention that "this Court needs to intervene now," Pet. 30, is without merit. At this juncture, the legal issues raised by the Petition have reached two circuits, and each circuit has remanded the case before it to the district court for further proceedings. Respondents respectfully submit that development of a much more extensive factual record and resolution of outstanding issues related to petitioners' NLRA preemption challenge should take place before this Court seriously considers reviewing a decision of the Ninth Circuit concerning AB 1889. Moreover, resolution of the remanded litigation in *Healthcare Ass'n,* 471 F.3d 87, would provide another opportunity for review of any later Second Circuit decision concerning the New York law at issue in that case.

Petitioners state that legislation similar to AB 1889 has been proposed in 15 other states. Pet. 29-30. In the event such legislation is enacted, affected employers will likely bring challenges that will lead to further development of the legal issues raised herein in nearly every other circuit court. Rather than granting review of the Ninth Circuit's decision that addresses a facial challenge only, in which the factual record has not been fully developed, this Court should allow for further percolation of the issues among the circuits to see if an actual conflict emerges.

III. THE EN BANC DECISION BELOW IS CONSISTENT WITH THIS COURT'S PRECEDENTS AND WAS CORRECTLY DECIDED

This Court has consistently upheld government restrictions on the use of its funds to subsidize speech when such restrictions have been challenged under the First Amendment. *See Rust*, 500 U.S. at 193-194, 203; *Lyng v. UAW*, 485 U.S. 360, 368-369 (1988); *Regan v. Taxation with Representation*, 461 U.S. at 549-551; *Cammarano v. United States*, 358 U.S. at 512-513.[4]

Notwithstanding such precedent, petitioners maintain that AB 1889's grant and program provisions improperly "burden[] employers' noncoercive speech," and therefore, the Ninth Circuit erred in its conclusion that AB 1889 is not preempted under the doctrines that this Court articulated in *Machinists,* 427 U.S. 132 and *Garmon*, 359 U.S. 236. *See* Pet. 19-20, 22. More specifically, petitioners contend that, in enacting AB 1889, California was asserting its spending power, a factor that this Court held was not in and of itself sufficient to avoid NLRA preemption in *Wisconsin Dept. of Indus. v. Gould* (*Gould*), 475 U.S. 282 (1986). Pet. 21-22. Petitioners' argument that the decision below is in conflict with *Gould* is without merit.

Gould involved a Wisconsin statute that prohibited the State from purchasing any products from vendors that had violated the NLRA. *Gould*, 475 U.S. at 283-284 & nn. 1-2. The law was preempted because the *Garmon* doctrine

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[4] By contrast, government spending restrictions may be unlawful if, unlike the AB 1889 provisions here, they preclude fund recipients from utilizing *private* sources of funds for expressive activities. *See, e.g., FCC v. League of Women Voters*, 468 U.S. 364, 400 (1984); *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 544-547 (2001).

precludes a state from taking on the role of the NLRB by imposing additional penalties for violations of the NLRA. *Id.* at 288. In concluding that the Wisconsin statute was preempted, this Court held that state action is not immune from preemption simply because the government is acting through its spending power. *Id.* at 289.

Petitioners misinterpret the en banc decision below as holding AB 1889 facially constitutional simply because California is asserting its spending power. That is not the case. Rather, the en banc panel correctly recognized that, unlike the statute in *Gould*, the California law does not attach any conditions on receipt of its funds that relate to an employer's activities funded from private sources. Pet. App. 17a. Moreover, the California law restricts certain spending of state funds without regard to whether the activities that would otherwise be subsidized violate the NLRA. California has not penalized any activities related to union organizing; it merely has declined to subsidize such activities with state money.

The AB 1889 provisions at issue would be analogous to the Wisconsin law at issue in *Gould* only if California refused to award grant or program funds to organizations that assist or deter union organizing with their own private funds. As the en banc panel recognized, if AB 1889 had such a requirement, the state would, as in *Gould,* be improperly using its spending power to "'introduce some standard of properly balanced bargaining power' or to alter employers' private spending decisions." Pet. App. 17a (*quoting Machinists*, 427 U.S. at 149-50). As AB 1889's grant and program provisions do not condition the *receipt*

of state funds on employer neutrality, those provisions do not run afoul of *Gould*. *Id.*[5]

Further, Congress' adoption of the *same* type of spending restriction on use of federal grant and program funds "to assist, promote, or deter union organizing" similar to those in AB 1889 makes it unlikely that Congress would view such restrictions as operating to frustrate the purpose of the NLRA. Pet. App. 21a (*citing De Veau v. Braisted*, 363 U.S. 144, 156 (1960) (plur. op.)).

This Court has made clear that, when analyzing an NLRA challenge, "'[c]onsideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law.'" *Boston Harbor*, 507 U.S. at 224 (*quoting Maryland v. Louisiana*, 451 U.S. 725, 746 (1981)). Moreover, the "'purpose of Congress is the ultimate touchstone' of preemption analysis." Pet. App. 12a (*quoting Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978) (some quotation marks omitted)).

These principles further confirm that the Ninth Circuit decision is consistent with this Court's preemption jurisprudence. The NLRA does not require California to provide funds to employers that lack sufficient funds of their own to assist, promote or deter union organizing. The NLRA, therefore, should not be interpreted as requiring California to allow employers to redirect state grant and program funds for those purposes.

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[5] Similarly, petitioners incorrectly contend that the Ninth Circuit's "holding authorizes even *direct* regulation of noncoercive employer speech." Pet. 29; *see also id.* at 14. The en banc court's opinion emphasizes that the distinction between regulating the use of government money and directly regulating private activity is critical to its holding. Pet. App. 16a-18a, 25a, 31a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: March 9, 2007

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of the State of California

THOMAS J. GREENE
Chief Assistant Attorney General

MANUEL M. MEDEIROS
State Solicitor General

LOUIS VERDUGO, JR.
Senior Assistant Attorney General

GORDON BURNS
Deputy Solicitor General

RICHARD T. WALDOW
Supervising Deputy Attorney General

ANGELA SIERRA
Supervising Deputy Attorney General
(*Counsel of Record*)

Counsel for Respondents Edmund G. Brown Jr., as the Attorney General of the State of California, the California Department of Health Services, Frank G. Vanacore as the Chief of the Audit Review and Analysis Section of the California Department of Health Services, and Diana M. Bonta, R.N., Dr. P.H. as the Director of the California Department of Health Services by her successor in that capacity, Sandra Shewry

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No. 06-939

IN THE

Supreme Court of the United States

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, *ET AL.*,

Petitioners,

v.

EDMUND G. BROWN JR., *ET AL.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY FOR PETITIONERS

STEPHEN A. BOKAT
ROBIN S. CONRAD
SHANE BRENNAN
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337
Of Counsel

WILLIS J. GOLDSMITH
(*Counsel of Record*)
JONES DAY
222 East 41st Street
New York, NY 10017
(212) 326-3649

[Additional counsel listed on signature page]

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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The nation's two largest commercial centers, California and New York, have enacted similar laws that restrict employers' ability to speak to their employees about union organizing. The United States Courts of Appeals for the Second and Ninth Circuits have issued detailed opinions addressing whether those state statutes are preempted by federal labor law. Respondents *concede* that the rationale of the *en banc* Ninth Circuit court conflicts with that of the Second Circuit. It is also undisputed that it conflicts with the expert views of the National Labor Relations Board, which has specifically stated that California's law conflicts with federal law. Finally, at least 15 other states are poised to enact similar laws depending on the outcome of this litigation. Based solely on these factors—on which there is no disagreement—certiorari should be granted.

Respondents' only response is to speculate that, either on remand or in an entirely new case, the Ninth Circuit might somehow reconcile its holding with that of the Second Circuit. Even if true, certiorari would still be warranted for the reasons stated. But this simply is not true.

The Ninth Circuit did not—despite respondents' repeated and misleading references to "facial" challenge—decide the preemption issue under the standard set forth in *United States v. Salerno*, 481 U.S. 739, 751 (1987). Rather it held, as a matter of law, that neither *Garmon*, *see San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959), nor *Machinists*, *see Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers v. Wis. Employment Relations Comm'n*, 427 U.S. 132 (1976), preemption speaks to noncoercive employer speech, so that states are free to regulate such speech through spending restrictions. That (sweeping) holding is law of the circuit, and, absent reversal, it would foreclose the district court and future Ninth Circuit panels from holding that California Assembly Bill 1889 is preempted.

Thus, contrary to respondents' suggestion, this clear split has immediate, tangible, and dramatic consequences. If allowed to stand, AB 1889 will encourage numerous other states to try their hands at refashioning the union organizing process, effecting a sea change in longstanding national labor policy. Nor would percolation provide further illumination of the concrete legal issue presented. This issue has been thoroughly explored in the Ninth Circuit's three decisions in this case, the decisions of the Second and Seventh Circuits, and the *amicus* brief of the NLRB. More importantly, delaying certiorari review would exacerbate the problem, forcing national and international businesses to follow 50 different standards depending on the predilections of the local jurisdiction. This is precisely what Congress intended to avoid in federalizing labor-management relations law.

In short, this Court should resolve the division amongst the circuits and NLRB to prevent the balkanization of the labor laws—a result directly at odds with Congress's intent in enacting a uniform National Labor Relations Act.

A. The Split With The Second Circuit Is Not Altered By The Misleading Use Of The Word "Facial"

The Ninth Circuit determined that AB 1889 is not subject to preemption under either *Garmon* or *Machinists*. *See* Pet. App. 23a, 32a (holding *Garmon* inapplicable because "Section 8(c) does not *grant* employers speech rights," which is thus not "an activity arguably protected" by the NLRA) (emphasis in original); Pet. App. 19a (holding *Machinists* inapplicable because "employer speech in the context of organizing" is not a "zone[] . . . left free from *all* regulation") (emphasis in original). In light of that holding, the Ninth Circuit flatly concluded that "sections 16645.2 and 16645.7 of AB 1889 are not preempted under either *Machinists* or *Garmon*." Pet. App. 36a.

The Second Circuit expressly rejected the Ninth Circuit's interpretation of *Garmon* and *Machinists*. *See Healthcare Ass'n of N.Y. State, Inc. v. Pataki*, 471 F.3d 87, 100 (2d Cir.

2006) (holding *Garmon* applicable because "section 8(c) does protect employer speech in the unionization campaign context"); *id.* at 107 (holding *Machinists* applicable because Congress intended "to leave employer speech largely unregulated"). It held that New York Labor Law section 211-a, which imposes similar speech restrictions, was preempted insofar as it restricts "the use of money that cannot be considered State funds," such as money that employers earn under fixed-price contracts, cost-based reimbursements that exclude union-related expenses, and programs in which federal funds pass through the state. *Id.* at 106.

The Second and Ninth Circuits are thus split with respect to both reasoning and result, and respondents do not seriously argue otherwise. They instead demur to certiorari by suggesting that petitioners might in the future bring an "as applied" challenge that may achieve an outcome similar to that currently found in *Pataki*. Opp. 12, 14. This is pure fancy, and nothing short of a complete rewrite of the Ninth Circuit's categorical opinion.

Absent reversal, there is *no* possibility that any court in the Ninth Circuit could hold AB 1889 preempted. The district court and future Ninth Circuit panels would be bound by the *en banc* court's unequivocal ruling that noncoercive speech is not "protected" under *Garmon* and is not an activity free from regulation under *Machinists*. That holding is not only law of the case, it is law of the circuit. *See United States v. Rodriguez-Lara*, 421 F.3d 932, 943 (9th Cir. 2005); *In re Rainbow Magazine, Inc.*, 77 F.3d 278, 281 (9th Cir. 1996). Indeed, under the Ninth Circuit's rationale, it is irrelevant that California chose to use its spending power in AB 1889: If *Garmon* and *Machinists* do not speak to noncoercive employer speech, as the *en banc* court held, California could directly restrict such speech with impunity.

The Ninth Circuit also specifically disagreed with the Second Circuit over whether and how spending restrictions

are preempted. The Ninth Circuit squarely held that restrictions like AB 1889 do not "burden" noncoercive employer speech because it restricts only the use of money obtained from the "state," but not other funds of the employer. *See* Pet. App. 17a ("In restricting the *use* of state funds, California has not made employer neutrality of the substantive terms of employment between employer and employee a condition for the *receipt* of state funds.") (emphases in original). In contrast, as noted, the Second Circuit held preempted restrictions on money derived from the state, such as contracts, cost-reimbursement programs, and other money not viewed as a "gift" from the state. *Pataki*, 471 F.3d at 102 n.7 ("In distinguishing between money that can be said to belong to the State and money that belongs to the employers, our analysis differs from that of both majority and dissent in *Lockyer*[.]").

Lest there be any doubt, the *en banc* court expressly blessed AB 1889's restrictions on "state program" funds that *exclude* reimbursement for union-related expenses. The Ninth Circuit explained that Medi-Cal, one of the "state programs" governed by AB 1889, was not preempted because it was "designed only to cover the costs of services performed" and that, pursuant to a federal statute, "costs incurred for activities directly related to influencing employees respecting unionization may not be included." Pet. App. 35a n.23 (internal quotation marks, emphases, and citations omitted). But the Second Circuit used this very same factor to conclude that New York's law *was* preempted. As the *Pataki* court explained, a state can accomplish its goals of "mak[ing] sure that [it] does not end up paying labor costs" and "saving money" by "limiting the kind of costs for which it will reimburse program participants." 471 F.3d at 104, 108. Having thus ensured that public funds are not used for union-related speech, the state has no justifiable interest in also "preventing [employers] from using their proceeds in a particular way." *Id.* at 103. Accordingly, the question remanded in the

Second Circuit—whether the state reimburses costs associated with union organizing—is legally irrelevant in the Ninth Circuit (indeed, is a factor *precluding* preemption).

Respondents' repeated references to "facial" challenge do not explain, alter, or ameliorate the split with the Second Circuit. Respondents' use of the term "facial" is misleading: Although petitioners do challenge the plain text and obvious effect of AB 1889, the Ninth Circuit did not resolve the question of NLRA preemption on the basis of the *Salerno* standard. *See* 481 U.S. at 751. The Ninth Circuit held that AB 1889 was permissible because *Garmon* and *Machinists* did not apply to it as a matter of law; it did not hold that AB 1889 escaped preemption because it *might* be applied in a manner that does not frustrate federal labor policy.[1] The word "facial" cannot harmonize the Second and Ninth Circuit decisions for the additional reason that the posture of both cases is identical: Petitioners in this case and plaintiffs in *Pataki* sought injunctive and declaratory relief that the respective state statutes are preempted by the NLRA. The posture of this case plainly did not compel the *en banc* court to uphold the challenged provisions of AB 1889 in their entirety. The Ninth Circuit is at loggerheads with the Second Circuit not because of any procedural differences, but because the former takes the legal position that restrictions on using money derived from the state for noncoercive

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[1] Each of the *en banc* court's references to "facial" challenge came in the context of addressing the First Amendment, not NLRA preemption. *See* Pet. App. 7a (citing *Rust v. Sullivan*, 500 U.S. 173 (1991), a First Amendment case); Pet. App. 34a (discussing First Amendment issue). The opinion's conclusion bears this out, as the qualifier "on their face" modifies only the First Amendment holding. Pet. App. 36a (holding that challenge provisions "are not preempted under either *Machinists* and *Garmon* and do not on their face infringe plaintiffs' First Amendment rights"). The first two Ninth Circuit panel opinions, furthermore, expressly rejected the significance of the *Salerno* standard with respect to NLRA preemption. *See* Pet. App. 90a-91a, 133a-135a.

employer speech are consistent with federal labor policy, whereas the latter takes the legal position that state restrictions on the use of money that an employer has earned impermissibly burden noncoercive employer speech.

In short, given the breadth of the Ninth Circuit's holding, there are no facts that petitioners could develop in future that would allow the district court to strike down AB 1889. In an obvious attempt to confuse this point, respondents (Opp. 13-14) seize upon an isolated statement from the *en banc* court's *First Amendment* ruling,[2] where it claimed that certain arguments made in the dissent went beyond the scope of petitioners' "facial challenge . . . and the record before us." Pet. App. 34a. It is clear, however, that the majority was rejecting the dissent's argument that AB 1889 "co-opts the payment for goods and services and profit realized under a contract" as *mischaracterizing* the program, which the majority believed "merely refused to fund such [union-related] activities out of the public fisc"—not because of any disputed facts to be resolved on remand or in an "as applied" challenge. Pet. App. 33a-34a (internal quotation marks and citations omitted). Given the majority's legal conclusion that AB 1889 is constitutional because "an employer retains the freedom to raise and spend its own funds," Pet. App. 32a, this passage can hardly be seen as an invitation from the *en banc* court for further factual development on the First Amendment issue, let alone on the analytically separate and distinct NLRA preemption issue. In sum, the Ninth Circuit's preemption ruling did not turn upon any disputed issues of fact, and it is that legal ruling on which certiorari is sought.[3]

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[2] The Ninth Circuit raised and resolved the First Amendment issue *sua sponte*; pursuant to a stipulation, petitioners and respondents agreed to appeal only the NLRA preemption issue. *See* Dkt. 168 (SER761).

[3] In perhaps its most desperate attempt to avoid certiorari, respondents speculate that, under the canon of constitutional doubt, "state funds" under AB 1889 might be interpreted to exclude "profits" received under

B. The Seventh and Ninth Circuits Take Different Approaches To NLRA Preemption

Respondents argue that the Seventh Circuit's decision in *Metropolitan Milwaukee Ass'n of Commerce v. Milwaukee County*, 431 F.3d 277 (7th Cir. 2005), would be relevant only if AB 1889 prevented employers "from using their private funds to support or oppose union organization." Opp. 15. But the Seventh Circuit made clear that a spending restriction nominally designed to protect the public fisc is preempted where, as here, it is truly designed to affect the employer's labor policies. *Metro. Milwaukee*, 431 F.3d at 279. In the course of determining whether Milwaukee County was acting as proprietor or regulator, the Seventh Circuit inquired whether the restriction on noncoercive employer speech with respect to County contracts would affect employers' labor relations on non-County contracts. *See id.* at 279-82. It determined that the ordinance would have a "spillover effect" on employers' speech unrelated to County contracts in light of the difficulties of maintaining separate labor policies for County and non-County contracts. *Id.* at 279. Here, it is undisputed that California's spending restriction was not designed to reduce state expenditures, but to regulate labor relations, and would be preempted by the

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state programs or grants. Opp. 19. But this ignores that the Ninth Circuit found AB 1889 constitutional without any limiting construction, or any hint that it might be suspect if it applied to "profits." That canon of interpretation, moreover, applies only where the constitutional reading is reasonably available, *see Clark v. Martinez*, 543 U.S. 371, 381-82 (2005), and respondents' purported "profit" carve-out finds no purchase in the text of AB 1889. Even were such an interpretation possible, it would be no palliative and, indeed, would result in an utterly unworkable system. Who would determine the "profit" derived from a state program or grant of $500,000? If an employer says that $60,000 is profit, and that it spent *that* money to oppose a union-organizing campaign, the union would file a lawsuit the next day challenging the employer's accounting and seeking treble damages and attorney's fees.

Seventh Circuit on that basis alone. Moreover, it is clear that AB 1889 also has a "spillover effect" burdening employers' ability to speak to employees not directly working on a state contract or program, because of the difficulty and litigation risks of segregating funds. *See* Pet. 23-27. Thus, had the Ninth Circuit followed the Seventh Circuit's preemption analysis, it would have easily concluded that AB 1889's restriction on "state funds" has an illegitimate regulatory purpose and, in any event, has an impermissible effect on employers' relations with employees involved in non-state work.[4]

C. The Preemption Issue Can And Should Be Resolved Now

Respondents argue that any burden imposed by AB 1889 cannot be determined without "factual findings." Opp. 17.

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[4] Respondents also defend the Ninth Circuit's decision on the merits by arguing that Congress has tacitly approved AB 1889 by enacting similar spending restrictions in three federal statutes. *See* Opp. 3-4, 23. Congress, of course, is not "preempted" from enacting federal laws consistent with the United States Constitution. *See, e.g., Smith v. Nat'l Steel & Shipbuilding Co.*, 125 F.3d 751, 755 (9th Cir. 1997) (preemption under the Supremacy Clause "is only implicated when a case involves a conflict between a federal and a state law"). These three project-specific spending restrictions, moreover, cannot plausibly be interpreted as an implicit repeal of section 8(c) of the NLRA and the longstanding federal labor policy in favor of noncoercive speech. *Cf. Sec. Indus. Ass'n v. Connolly*, 883 F.2d 1114, 1122 (1st Cir. 1989) (refusing to "infer implicit congressional approval" of Massachusetts's regulations where federal agencies had adopted or approved rules "not dissimilar in spirit from the Massachusetts regulations" because the agency actions were the "products of federal, not state, authority," which is "a critical distinction"). Indeed, the expert agency entrusted with safeguarding federal labor policy has concluded that these narrow federal programs do not support *state* regulation of noncoercive employer speech. *See* NLRB *Amicus* Brief at 28, *available at* 2003 WL 22330725 (noting that Congress had the authority to impose these restrictions "in discrete federal health and social welfare programs," but that "[i]t does not follow at all that a state may do likewise").

Yet when this Court determined that similar administrative burdens (including the creation of segregated accounts) had the effect of deterring speech, it did not refer to any factual findings, but rather ascertained the practical effect of the statute by evaluating its textual commands. *See FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 253-55 (1986). Respondents' argument, moreover, wholly miscomprehends the nature of NLRA preemption: *Garmon* deals with "potential conflict" in "classes of situations," 359 U.S. at 242, and *Machinists* demarcates zones of activity that are not "regulable by States," 427 U.S. at 149. The prophylactic nature of NLRA preemption "*precludes* an *ad hoc* inquiry into the special problems of labor-management relations in a particular set of occurrences." *Garmon*, 359 U.S. at 242 (emphasis added). Thus, to guard against potential conflicts with the federal labor scheme, courts routinely address the issue of NLRA preemption before the state law has been enforced. *See, e.g., Metro. Milwaukee Ass'n of Commerce v. Milwaukee County*, 325 F.3d 879, 882-83 (7th Cir. 2003) (pre-enforcement review because NLRA preemption raises "almost purely legal issues that are quintessentially fit . . . for present judicial resolution") (internal quotation marks and citations omitted); *Employers Ass'n, Inc. v. United Steelworkers*, 32 F.3d 1297, 1299 (8th Cir. 1994) (pre-enforcement review where state "statute permanently and substantially shifts the terms of bargaining in favor of the union"). As the D.C. Circuit has recognized, the very existence of a law may interfere with the NLRA by altering behavior. *See Chamber of Commerce v. Reich*, 57 F.3d 1099, 1100 (D.C. Cir. 1995) ("[T]he mere existence of the [Executive] Order alters the balance of bargaining power between employers and employees by *creating a disincentive* for employers to hire replacement workers and thereby depriving them of a significant economic weapon in the collective bargaining process.") (emphases added).

The deterrent effects of AB 1889 are patent and do not necessitate the resolution of any issues of fact. AB 1889

prohibits using some part of the employer's funds for labor speech, which is a burdensome restriction on freedom in all circumstances. *See* Pet. 4-6. The manifest and intended effects of AB 1889 are only confirmed by the affidavits in the record, *see*, *e.g.*, Dkt. 34 (SER 54-58), as well as the evidence of the unions' use of AB 1889, before it was enjoined, to gain leverage against employers in ongoing union organizing campaigns, *see* Pet. App. 67a-70a.

Given the clear split on this legal issue, percolation is unnecessary and would exacerbate the very problem that Congress sought to foreclose in enacting the NLRA. "[O]ne of the basic purposes of the NLRA [is] to establish a uniform national labor policy" in order to shield both businesses and labor unions from the vagaries of state and local laws. *Int'l Longshoremen's Ass'n v. Allied Int'l, Inc.*, 456 U.S. 212, 221 n.17 (1982). Because at least 15 other states are poised to enact laws similar to AB 1889, delaying certiorari review would allow the very confusion and inconsistent legal obligations that the NLRA was specifically designed to foreclose. As this Court concluded in an analogous context, if a state law allegedly "is void because it hinders" a national policy favoring "the commercial development of atomic energy, delayed resolution would frustrate one of the key purposes of the [Atomic Energy] Act." *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 202 (1983) (internal quotation marks and citation omitted). In sum, this matter requires the Court's immediate attention, and there is no question that the Ninth Circuit's preemption ruling is ripe for certiorari review, and reversal.

Respectfully submitted,

STEPHEN A. BOKAT
ROBIN S. CONRAD
SHANE BRENNAN
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337
Of Counsel

BRADLEY W. KAMPAS
SCOTT OBORNE
JACKSON LEWIS LLP
199 Fremont Street
10th Floor
San Francisco, CA 94105
(415) 394-9400
Of Counsel

WILLIS J. GOLDSMITH
(*Counsel of Record*)
JONES DAY
222 East 41st Street
New York, NY 10017
(212) 326-3649

GLEN D. NAGER
MICHAEL A. CARVIN
NOEL J. FRANCISCO
LUKE A. SOBOTA
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
(202) 879-3939
Counsel for Petitioners

March 20, 2007

No. 06-939

In the Supreme Court of the United States

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

EDMUND G. BROWN, JR., ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

PAUL D. CLEMENT
Solicitor General
Counsel of Record

THOMAS G. HUNGAR
Deputy Solicitor General

NICOLE A. SAHARSKY
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

RONALD MEISBURG
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

JOHN H. FERGUSON
Associate General Counsel

LINDA DREEBEN
Assistant General Counsel

KYE PAWLENKO
KEVIN FLANAGAN
Attorneys
National Labor Relations Board
Washington, D.C. 20570

QUESTION PRESENTED

Whether the National Labor Relations Act, 29 U.S.C. 151-169, preempts a California law that prohibits private employers that receive state grant and program funds from using those funds "to assist, promote, or deter union organizing," Cal. Gov't Code §§ 16645.2, 16645.7 (West Supp. 2007).

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S. Rep. No. 105, 80th Cong., 1st Sess. (1947) 3

In the Supreme Court of the United States

No. 06-939

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

EDMUND G. BROWN, JR., ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the order of this Court inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be granted.

STATEMENT

1. a. Congress enacted the National Labor Relations Act (NLRA), 29 U.S.C. 151 *et seq.*, to "create a national, uniform body of labor law and policy, to protect the stability of the collective bargaining process, and to maintain peaceful industrial relations." *United States* v. *Palumbo Bros.*, 145 F.3d 850, 861 (7th Cir.), cert. denied, 525 U.S. 949 (1998). To accomplish those goals, Congress established an integrated scheme of rights, protections, and prohibitions governing employee, em-

ployer, and union conduct during organizing campaigns, representation elections, and collective bargaining. Congress also created a centralized administrative agency, the National Labor Relations Board (Board), to interpret and administer the NLRA and to resolve labor disputes. See 29 U.S.C. 153-154, 160; *Garner* v. *Teamsters, Local Union No. 776*, 346 U.S. 485, 490 (1953).

The NLRA protects employees' rights to join or not to join a union, and it provides a mechanism for peacefully and expeditiously resolving questions concerning union representation. See *Boire* v. *Greyhound Corp.*, 376 U.S. 473, 476-479 (1964). Section 7 of the NLRA sets forth the core rights of employees "to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing" and "to engage in other concerted activities" as well as the right "to refrain from any or all such activities." 29 U.S.C. 157. Section 8 defines and prohibits union and employer "unfair labor practices" that infringe on employees' Section 7 rights. 29 U.S.C. 158. Section 9 establishes procedures for the Board to use in regulating and certifying union elections, see 29 U.S.C. 159, and Section 10 authorizes the Board to adjudicate claims of unfair labor practices, see 29 U.S.C. 160. Pursuant to Section 9, the Board has determined that a secret ballot election is the preferred method for resolving representational disputes because it best protects employee free choice. See 29 U.S.C. 159(c), (e); *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 602 (1969).

The NLRA encourages the free flow of information from both unions and employers to employees as they consider whether to be represented by a union. Although the Board initially took the position that Section 8 of the NLRA demanded employer neutrality during

organizing campaigns, see, *e.g.*, *Letz Mfg. Co.*, 32 N.L.R.B. 563, 571-572 (1941), this Court held that Section 8 prohibits only coercive employer speech, see *NLRB* v. *Virginia Elec. & Power Co.*, 314 U.S. 469, 477 (1941). Congress then amended the NLRA to "insure both to employers and labor organizations full freedom to express their views to employees on labor matters." S. Rep. No. 105, 80th Cong., 1st Sess. 23-24 (1947). In particular, Congress added Section 8(c), which provides: "The expressing of any views, argument, or opinion, or the dissemination thereof * * * shall not constitute or be evidence of an unfair labor practice * * * if such expression contains no threat of reprisal or force or promise of benefit." 29 U.S.C. 158(c). Section 8(c) thus "manifests a congressional intent to encourage free debate on issues dividing labor and management." *Linn* v. *United Plant Guard Workers, Local 114*, 383 U.S. 53, 62 (1966).

b. "[I]n passing the NLRA Congress largely displaced state regulation of industrial relations." *Wisconsin Dep't of Indus.* v. *Gould Inc.*, 475 U.S. 282, 286 (1986) (*Gould*). This Court has recognized two distinct NLRA preemption principles.

The first principle—enunciated in *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959) (*Garmon* preemption)—is that States may not regulate "activity that the NLRA protects, prohibits, or arguably protects or prohibits." *Gould*, 475 U.S. at 286; see *Garmon*, 359 U.S. at 244. *Garmon* preemption preserves the jurisdiction of the Board by precluding States from regulating the same conduct that Congress intended the Board to regulate under uniform national law. *Garmon*, 359 U.S. 242-244; see *Gould*, 475 U.S. at 286.

The second principle—recognized in *Lodge 76, International Association of Machinists* v. *Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976) (*Machinists* preemption)—is that States may not regulate conduct that "Congress intended * * * 'to be controlled by the free play of economic forces.'" *Id.* at 140 (citation omitted). *Machinists* preemption preserves Congress's "intentional balance between the uncontrolled power of management and labor to further their respective interests." *Building & Constr. Trades Council* v. *Associated Builders & Contractors of Mass./R.I., Inc.*, 507 U.S. 218, 226 (1993) (*Boston Harbor*) (internal quotation marks and citations omitted).

2. In September 2000, California enacted Assembly Bill No. 1889, Cal. Gov't Code §§ 16645-16649 (A.B. 1889),[1] which prohibits entities that receive state funds from using the funds to "assist, promote, or deter union organizing." In order to prevent "interfere[nce] with an employee's choice about whether to join or to be represented by a labor union," the statute "prohibit[s] an employer from using state funds and facilities for the purpose of influencing employees to support or oppose unionization." 2000 Cal. Stat. ch. 872, § 1.

The prohibition on "assist[ing], promot[ing], or deter[ring] union organizing" is expansively defined to include "any attempt by an employer to influence the decision of its employees" regarding "[w]hether to support or oppose a labor organization" or "whether to become a member of any labor organization." Cal. Gov't Code § 16645(a). The statute's spending restriction applies to "any expense, including legal and consulting fees

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[1] Unless otherwise noted, all citations to Cal. Gov't Code §§ 16645-16649 are to the 2007 supplement.

and salaries of supervisors and employees, incurred for * * * an activity to assist, promote, or deter union organizing." *Id.* § 16646(a). A.B. 1889 exempts certain categories of labor relations expenses from its broad prohibition, however, including expenses incurred in "[n]egotiating, entering into, or carrying out a voluntary recognition agreement with a labor organization," *i.e.*, expenses incurred by an employer in agreeing to recognize a union without insisting that the union first be chosen as the employees' bargaining representative by secret ballot. *Id.* § 16647(d); see *Linden Lumber Div., Summer & Co.* v. *NLRB*, 419 U.S. 301, 309-310 (1974).

A.B. 1889 contains extensive compliance and enforcement provisions. Entities that receive state funds must "provide a certification to the state that none of the funds will be used" for prohibited expenditures, Cal. Gov't Code §§ 16645.2(c), 16645.7(b), and "maintain records sufficient to show" their compliance, *id.* §§ 16645.2(c), 16645.7(c). The statute presumes that funds received from the State are commingled and spent on prohibited activities unless an employer can demonstrate otherwise. See *id.* § 16646(b). Moreover, suspected violators may be sued by the state Attorney General or any private taxpayer for injunctive relief, treble damages, attorney's fees, and costs. See *id.* §§ 16645.2(d), 16645.7(d), 16645.8.

At issue here are the portions of A.B. 1889 regulating spending by any private employer that receives either "a grant of state funds," Cal. Gov't Code § 16645.2(a), or more than $10,000 per year "on account of its participation in a state program," *id.* § 16645.7(a).[2]

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[2] A.B. 1889 also regulates state contractors, Cal. Gov't Code §§ 16645.1, 16645.3, 16645.4; employers conducting business on state

One type of "program" at issue is Medi-Cal, the state Medicaid program, in which California reimburses healthcare providers when they provide healthcare services for eligible citizens. The reimbursement amount is based in part on providers' reported "allowable costs" under the terms of the Medi-Cal program, which prohibits reimbursement for "provider expenditures to assist, promote, or deter union organizing." C.A. E.R. 48, 56. A.B. 1889 supplements that restriction by "regulat[ing] the manner in which Medi-Cal providers may spend state funds" once a provider has received funds from the State as payment for a service. State's Summ. J. Reply 16 (C.D. Cal. filed Aug. 30, 2002) (No. 02-CV-377) (State's Summ. J. Reply).[3]

3. Petitioners challenged A.B. 1889 in federal district court, alleging that the statute is preempted by the NLRA under both *Machinists* and *Garmon*. The district court granted partial summary judgment for petitioners. Pet. App. 140a-149a. It held that A.B. 1889's restrictions on grant and program funds are preempted under *Machinists*, because the NLRA "manifests a congressional intent to encourage free debate on issues dividing labor and management," *id.* at 146a (quoting *Linn*, 383 U.S. at 62), and A.B. 1889 "prevent[s] this free debate" by "regulat[ing] employer speech about union organizing," *id.* at 147a. The court rejected respondents' contention that A.B. 1889 is a permissible means of "controlling the use of state funds" as a "'market participant,'" holding that the statute is regulatory, not

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property, *id.* § 16645.5; and public employers, *id.* § 16645.6. Those restrictions are not at issue in this case. See Pet. App. 3a, 142a-143a.

[3] The Medi-Cal program also has a managed care aspect, *e.g.*, *Life Care Ctrs. of Am.* v. *CalOptima*, 35 Cal. Rptr. 3d 387, 389 (Ct. App. 2005), which does not appear to be at issue in this case.

proprietary, in nature. *Id.* at 147a-148a (citation omitted).

4. a. A panel of the court of appeals affirmed the district court, both in an initial opinion, Pet. App. 114a-139a, and in a second opinion after granting panel rehearing, *id.* at 58a-113a. The court of appeals then granted en banc review and reversed and remanded. *Id.* at 1a-57a.

At the outset, the court rejected respondents' argument that A.B. 1889 is proprietary, rather than regulatory, in nature. Pet. App. 7a-12a. The court noted that "[t]he statute on its face does not purport to reflect California's interest in the efficient procurement of goods and services"; instead, it indicates "a general state position of neutrality with regard to organizing" and a desire to impact "an employer's attempt to influence employee choice about whether to join a union." *Id.* at 11a-12a.

Despite A.B. 1889's regulatory purpose, the court of appeals concluded that the statute's grant and program restrictions "do not undermine federal labor policy." Pet. App. 3a. The court held that *Machinists* preemption does not apply to A.B. 1889 because employer speech regarding union organizing is not an area that Congress intended to be free from "*all* regulation." *Id.* at 19a-21a. The court also found the State's regulation of employer speech permissible because "the state's choices of how to spend its funds are by definition not controlled by the free play of economic forces." *Id.* at 17a.

The court found *Garmon* preemption inapplicable as well, reasoning that while Section 8(c) "prohibits sanctioning employers" for "exercis[ing] speech rights," it "does not *grant* employers speech rights." Pet. App. 23a, 25a. The court also found "no potential overlap be-

tween the [Board's] jurisdiction and that of a state court hearing a suit brought under AB 1889." *Id.* at 29a-30a. In any event, the court concluded, California's substantial interest "in determining how the recipients of state grant and program funds use those funds" would save A.B. 1889. *Id.* at 30a.

b. Three judges dissented. They explained that "AB 1889 prohibits not just the use of state money granted to an employer for and under a specific program"; it also restricts how state funds may be used even after an employer has "fully performed" its obligation to the State and the funds "can no longer be considered 'state funds.'" Pet. App. 36a-39a (Beezer, J., dissenting). They concluded that A.B. 1889 is preempted under *Machinists* because the NLRA generally "takes a *laissez faire* approach to employee and employer speech, allowing passionate, partisan debate * * * during a union organizing campaign," and A.B. 1889 interferes with that unregulated zone. *Id.* at 48a-49a, 53a. And they found A.B. 1889 preempted under *Garmon* because it "stifles employer speech rights" that are protected by Section 8(c) of the NLRA and guarded by the Board. *Id.* at 51a, 53a.

DISCUSSION

In enacting A.B. 1889, California has adopted a policy of coercing certain employers to remain silent in response to union organizing efforts. That state labor policy conflicts with the NLRA's longstanding policy in favor of robust debate during organizing drives and impinges on the Board's generally exclusive authority to regulate employer speech regarding union organizing. The court of appeals' conclusion that A.B. 1889 triggers neither *Machinists* nor *Garmon* preemption reflects an incorrect and exceedingly narrow view of this Court's

precedents and conflicts with the decision of another court of appeals. The question whether a State may impose restrictions contrary to federal policy on entities accepting state funds in order to further its own labor relations policy is an important and recurring one that warrants this Court's consideration, and this case provides an appropriate vehicle for addressing it. Accordingly, the petition for a writ of certiorari should be granted.

I. THE DECISION BELOW DEPARTS SIGNIFICANTLY FROM THIS COURT'S PRECEDENTS

A. The Court Of Appeals Erred In Failing To Find A.B. 1889 Preempted Under *Machinists* And *Garmon*

The court of appeals erred in failing to recognize that employer speech regarding unionization is an area that Congress intended to be generally free of state regulation. A fundamental policy underlying the NLRA is the importance of robust debate as a means of protecting the Section 7 rights of employees to make informed decisions about whether to select an exclusive bargaining representative. See *Gissel Packing Co.*, 395 U.S. at 617-618; *Trent Tube Co.*, 147 N.L.R.B. 538, 541 (1964); *Harlan Fuel Co.*, 8 N.L.R.B. 25, 32 (1938). The Ninth Circuit failed to protect that important federal policy from interference by taking an unduly narrow view of the *Machinists* doctrine. Moreover, the Ninth Circuit erred in failing to find A.B. 1889 preempted by *Garmon* to the extent it regulates employer speech that has been left to the Board to regulate.

1. A.B. 1889 is preempted under *Machinists* because it regulates employer speech that Congress intended to leave unregulated. Congress recognized that non-coer-

cive employer speech during organizing campaigns is vital to ensuring that employees make free and informed choices regarding union representation, and it added Section 8(c) to the NLRA to ensure that such speech would remain unregulated. *E.g.*, *Linn*, 383 U.S. at 62. A.B. 1889 impermissibly regulates employer speech by penalizing "any attempt" by an employer "to influence the decision of its employees" regarding "[w]hether to support or oppose" unionization. Cal. Gov't Code § 16645(a)(1).

Moreover, A.B. 1889 does not apply its constraints on employer speech neutrally. While purporting to implement a blanket policy against "interfer[ence] with an employee's choice about whether to * * * to be represented by a labor union" (2000 Cal. Stat. ch. 872, § 1), A.B. 1889 subsidizes employer waivers of secret ballot elections—thereby weakening the safeguard that the Board has determined (see p. 2, *supra*) best protects employee free choice with respect to union representation. See Cal. Gov't Code § 16647(d) (permitting employers to use funds received from the State to negotiate and administer voluntary recognition agreements with unions). By encouraging regulated employers to grant recognition without an election, while making it difficult or impossible for them to participate meaningfully in an election if one is held, A.B. 1889 upsets the balance struck by the NLRA and denies employers "'a weapon that Congress meant [them] to have available.'" *Machinists*, 427 U.S. at 150 (citation omitted).

The court of appeals erred in deeming *Machinists* inapplicable on the ground that "employer speech in the context of organizing" is not a "zone[] of activity" that Congress left free from "*all* regulation." Pet. App. 19a; see also *id.* at 21a. *Machinists* preemption operates

within a framework of extensive Board regulation of numerous aspects of the management-labor relationship. Thus, *Machinists* can apply in an area in which Congress has broadly defined protected and unprotected activities and has empowered the Board to define the contours of those activities, as long as the "particular activity" at issue is "an activity that Congress intended to be 'unrestricted by *any* governmental power to regulate.'" 427 U.S. at 141 (citation omitted).

In *Machinists* itself, for example, the Court held that state law was preempted even though the general "zone of activity" at issue—the use of economic weapons in labor disputes—was the subject of extensive regulation under the NLRA. Congress had proscribed the use of some economic weapons, left others unregulated, and authorized the Board to draw lines consistent with the statute. See 29 U.S.C. 158(b)(4); *NLRB* v. *Insurance Agents' Int'l Union*, 361 U.S. 477, 490 (1960). The *particular* economic weapon at issue, however—a concerted refusal to work overtime aimed at pressuring an employer in a collective bargaining dispute—had been left *unregulated*, and therefore could not be regulated by the States without impermissibly "'denying one party to an economic contest a weapon that Congress meant him to have available.'" *Machinists*, 427 U.S. at 150 (citation omitted); see *id.* at 142-151; see also *Garner*, 346 at 499-500 ("The detailed prescription of a procedure for restraint of specified types of picketing would seem to imply that other picketing is to be free of other methods and sources of restraint. * * * For a state to impinge on the area of labor combat designed to be free is * * * an obstruction of federal policy."). The Ninth Circuit therefore erred, and departed from this Court's

precedents, in holding that *Machinists* does not apply here.

2. The court of appeals also erred in circumscribing the reach of *Garmon*. *Garmon* preemption principles apply to A.B. 1889 because, in addition to regulating employer speech that Congress deliberately left unregulated, the statute also regulates coercive or prejudicial employer speech during organizing campaigns, and Congress assigned that regulatory function to the Board. The Board has primary jurisdiction to draw the line between coercive speech that violates Section 8(a)(1), *Gissel Packing Co.*, 395 U.S. at 620, or is prejudicial to a fair election, see *General Shoe Corp.*, 77 N.L.R.B. 124, 126 (1948), and non-coercive speech that enhances employee free choice and is therefore immune from regulation, see 29 U.S.C. 158(c); *Trent Tube Co.*, 147 N.L.R.B. at 541.

There is no place in the NLRA's comprehensive regulatory scheme for state regulation of employer speech to effectuate state labor policy. A.B. 1889 regulates a broad swath of employer speech regarding unionization—including speech that falls close to, and on either side of, the line drawn by the NLRA—in order to advance California's goal of preventing regulated employers "from seeking to influence employees to support or oppose unionization." 2000 Cal. Stat. ch. 872, § 1. Moreover, A.B. 1889 subjects all regulated employers to the substantial risk and burden of state investigation, private suits, treble damages, and attorney's fee awards in the event an employer fails to meet its burden of demonstrating that no state funds were commingled with funds used for employer speech regarding unionization. See Cal. Gov't Code §§ 16645.2, 16645.7, 16645.8.

Accordingly, A.B. 1889 is preempted under *Garmon*, because it regulates employer speech that the NLRA "prohibits, or arguably * * * prohibits," *Gould*, 475 U.S. at 286, and intrudes on the Board's primary jurisdiction to determine when employer speech regarding union organizing is impermissible. As this Court recognized in *Gould*, "'conflict is imminent' whenever 'two separate remedies are brought to bear on the same activity,'" and the States are therefore barred "from providing their own regulatory or judicial remedies for conduct prohibited or arguably prohibited by the Act." *Id.* at 286 (citation omitted).

B. The Court Of Appeals Misapplied *Boston Harbor* And *Gould*

The court of appeals held that A.B. 1889 is saved from preemption because a State may regulate the use of its own funds. See Pet. App. 16a-19a, 31a-32a. That holding rests on a substantial misreading of this Court's precedents. In considering claims of NLRA preemption, this Court has found certain government contract conditions that affect labor permissible when the government acts in its proprietary capacity as a "market participant." *Boston Harbor*, 507 U.S. at 227, 229-231. As this Court has explained, the distinction "between government as regulator and government as proprietor" is crucial, because "pre-emption doctrines apply only to state *regulation*." *Id.* at 227. And a state regulatory measure does not escape preemption merely because it regulates using the State's spending power. See *Gould*, 475 U.S. at 287.

Here, the court of appeals correctly found (Pet. App. 11a) that A.B. 1889 is "regulatory" and is "not protected by the market participant exception." As a state regula-

tory measure, A.B. 1889 is therefore subject to the normal standards for *Machinists* and *Garmon* preemption, and, as discussed (see pp. 9-13, *supra*), it is preempted under those standards. Once it is established that A.B. 1889 is a regulatory measure and is preempted under *Machinists* or *Garmon*, the means used by the State to achieve its regulatory objective—restricting the use of funds received from the State—are irrelevant to the preemption analysis. In concluding otherwise, the court of appeals mistakenly reintroduced market participant principles through the backdoor and effectively created an entirely new exception to NLRA preemption that cannot be reconciled with *Gould* and *Boston Harbor*.

As the court of appeals correctly acknowledged, A.B. 1889 is plainly regulatory, and not merely proprietary, under this Court's precedents. The statute's stated purpose and effect is to further a labor policy of (selective) employer silence regarding union organizing, a policy in direct conflict with federal labor policy. See 2000 Cal. Stat. ch. 872, § 1. A.B. 1889 upsets the balance struck by the NLRA and applies regulatory pressure in favor of unionization by impeding or silencing employers who would oppose union organizing efforts, while allowing funds received from the State to be used for any labor costs *except* the costs of employer speech regarding unionization. For example, A.B. 1889 permits state funds to be spent on voluntary recognition agreements, see Cal. Gov't Code § 16647(d), despite an employer's right to require that representational disputes be resolved using a secret ballot. See 29 U.S.C. 159(c) and (e). Moreover, "the essentially punitive rather than corrective nature" of A.B. 1889's comprehensive enforcement scheme underscores its regulatory goal. *Gould*, 475 U.S. at 288 n.5.

Although a State has a legitimate proprietary interest in ensuring that state funds appropriated for a proper purpose are spent in accordance with that purpose, A.B. 1889's restrictions on grant recipients are not of that type. Rather than adopting a neutral requirement that grant funds may be spent solely for the purposes of the relevant grant program, for example, A.B. 1889 allows funds to be spent for any labor costs other than the costs of employer speech regarding union representation. Thus, A.B. 1889's grant restrictions operate in a regulatory fashion by targeting a particular category of disfavored employer speech, and cannot be justified as a "legitimate response to state procurement constraints or to local economic needs." *Gould*, 475 U.S. at 291.

A.B. 1889's restrictions on state program participants also extend beyond any arguably legitimate proprietary interest. For example, the State's Medi-Cal program already includes detailed rules specifying which costs the State views as reimbursable, ensuring that California reimburses institutional providers only for those expenses. See C.A. E.R. 48, 56. A.B. 1889 goes beyond those restrictions by regulating how service providers may use funds received from the State even after the service has been provided and the funds can no longer be considered "state funds." See State's Summ. J. Reply 16. California has no legitimate *proprietary* interest in controlling what a healthcare provider does with reimbursement payments it has earned by providing covered medical services.

Thus, California's invocation of its spending power cannot save its regulation of labor relations from preemption. A.B. 1889 is plainly not an example of a "State act[ing] as a market participant with no interest in set-

ting policy." *Boston Harbor*, 507 U.S. at 229. It is instead a state regulatory measure designed to advance California's chosen labor policies, and it must therefore be judged under the preemption standards applicable to such state regulation. *Id.* at 227.

Moreover, having correctly recognized that A.B. 1889 involves regulation, not the State's proprietary role as a market participant, the court of appeals erred in finding *Machinists* preemption inapplicable because the State's spending decisions are not controlled by market forces. The proper place to consider the relevance, if any, of the fact that A.B. 1889 takes the form of a restriction on spending is in the initial consideration of whether it falls within the market participant exception. Having correctly concluded that A.B. 1889 is in substance regulatory, the court of appeals erred in relying on "the state's choices of how to spend its funds" as a basis for rejecting *Machinists* preemption. Pet. App. 17a.[4]

II. THE CIRCUITS ARE IN CONFLICT OVER THE QUESTION PRESENTED

In *Healthcare Ass'n of New York State, Inc.* v. *Pataki*, 471 F.3d 87 (2006), the Second Circuit considered whether New York Labor Law § 211-a (McKinney Supp. 2007) (Section 211-a) is preempted by the NLRA. Like A.B. 1889, Section 211-a prohibits entities from using any "monies appropriated by the state" for "encourag[ing] or discourag[ing] union organization" or

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[4] For essentially the same reasons, the court of appeals erred in holding that A.B. 1889 is saved from preemption because a State's exercise of its spending power is "deeply rooted in local feeling and responsibility." Pet. App. 30a-31a (quoting *Garmon*, 359 U.S. at 243-244).

"participati[on] in a union organizing drive." *Id.* § 211-a(2). The statute's stated purpose is to "ensure that funds appropriated by the legislature for the purchase of goods and provision of needed services are ultimately expended solely for the purpose for which they were appropriated." *Id.* § 211-a(1).

The plaintiffs, healthcare providers, argued that Section 211-a impermissibly conditions receipt of state funds on an employer's neutrality regarding union representation. See 471 F.3d at 91-92. They explained that Section 211-a prohibits employer speech using state funds even after the State has paid for and received the goods or services for which it bargained, thus preventing them "from using their own money to communicate with their employees regarding whether it is desirable to unionize." *Id.* at 92.

The Second Circuit found both *Machinists* and *Garmon* preemption principles applicable to Section 211-a. Its analysis diverged from that of the Ninth Circuit in several important respects.

A. The Second Circuit applied *Machinists* preemption because it found that employer speech during union organizing campaigns is an area in which Congress generally intended to allow "'the free play of economic forces.'" 471 F.3d at 107 (citation omitted). The court explained that "the protection afforded by section 8(c) is to leave employer speech largely unregulated." *Ibid.* The Ninth Circuit, by contrast, held that the Board's ability to regulate coercive or prejudicial employer speech precludes *Machinists* preemption. See Pet. App. 19a-20a & n.11.

B. The Second Circuit also held that Section 8(c) "protect[s] employer speech in the unionization campaign context and can provide a basis for *Gar-*

mon preemption." 471 F.3d at 97, 100. In concluding that *Garmon* applied, the court expressly rejected the view, accepted by the Ninth Circuit, that Section 8(c) does not affirmatively protect speech but "merely states that such speech will not be sanctionable as an unfair labor practice." *Id.* at 99; cf. Pet. App. 23a-24a.

C. In evaluating whether Section 211-a is saved from preemption as an exercise of the State's proprietary authority, the Second Circuit again took a different approach from that of the Ninth Circuit. The Second Circuit explained that "a government can 'make a value judgment favoring' [certain] conduct" and "implement that judgment by allocating public funds in a [certain] way," but it "cannot leverage its money to affect" an employer's activity "beyond [its] dealings with the State." 471 F.3d at 101-102 (citations omitted). The court thus determined that whether Section 211-a is preempted depends upon the "State's and the employers' respective rights in the funds at issue," which "are determined by the nature of the transaction by which the money changed hands." *Id.* at 101-102 n.7. In the Second Circuit's view, a State may place "restriction[s] on what use may be made of State grants," but it may not restrict the "use of proceeds earned from state contracts and statutory reimbursement obligations in which the contractor's labor costs cannot affect the amount of expense to the State." *Id.* at 105.

In contrast, the Ninth Circuit held that A.B. 1889's restrictions on both grant and program funds are valid because the statute restricts only the use of state funds, and "a state's control of its purse strings" is an issue "deeply rooted in local feeling and responsibility." Pet. App. 31a-32a (quoting *Garmon*, 359 U.S. at 244). In so holding, the Ninth Circuit approved restrictions that the

Second Circuit would find preempted. For example, with respect to state Medicaid funds, the Second Circuit upheld "restrictions on reimbursable costs" but not "restrictions on what can be done with money once it has changed hands," 471 F.3d at 104, whereas the Ninth Circuit approved both, see Pet. App. 34a-35a & n.23; see also pp. 5-6, 15, *supra*. Thus, the decision below conflicts in several respects with the Second Circuit's decision in *Healthcare Association*.

III. THE QUESTION PRESENTED IS IMPORTANT, AND THIS CASE IS AN ADEQUATE VEHICLE FOR RESOLVING IT

A. The question whether a State may regulate labor relations using its spending power is an important one that implicates the uniformity of the national labor relations regulatory scheme embodied in the NLRA and administered by the Board. This Court has deemed substantial claims of state interference with federal labor policy sufficiently important to warrant review without regard to any conflict in the circuits. See, *e.g.*, *Livadas* v. *Bradshaw*, 512 U.S. 107, 116 (1994); *Boston Harbor*, 507 U.S. at 224; *Golden State Transit Corp.* v. *City of L.A.*, 475 U.S. 608, 613 (1986). Here, the conflict between the Second and Ninth Circuits has created uncertainty regarding the nature of the restrictions, if any, that a State may place on the use of funds received from the State as a means of regulating employer speech regarding unionization.

The question presented is likely to recur, because California's attempt to regulate labor relations using its spending power is not unique. In addition to California and New York, eight States have enacted laws of varying breadth that prohibit the use of state funds to en-

courage or discourage union organizing.[5] And efforts are underway in at least five States to enact legislation patterned specifically on the California statute.[6] Those legislative efforts threaten to undermine the purpose of the NLRA, which was to "obtain 'uniform application' of its substantive rules and to avoid the 'diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies.'" *NLRB* v. *Nash-Finch Co.*, 404 U.S. 138, 144 (1971) (citation omitted).

Indeed, A.B. 1889 appears to have altered significantly the balance of labor relations in California, with unions "aggressively us[ing] A.B. 1889 to gain a special advantage in labor disputes" by, for example, "alleging violations of the statute in an effort to coerce employers" to refrain from any speech during unionization drives. Pet. App. 46a (Beezer, J., dissenting). The potential for disruption of the carefully calibrated NLRA regulatory scheme is substantial. This Court's review is therefore warranted.

B. This case is an appropriate vehicle for resolving the question presented. First, although respondents assert that petitioners brought only a facial challenge to A.B. 1889, petitioners' complaint appears to have sought

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[5] See Fla. Stat. Ann. § 400.334 (2006); 5 Ill. Comp. Stat. § 315/10(a)(6) (2005); 115 Ill. Comp. Stat. § 5/14(a)(9) (2006); Me. Rev. Stat. Ann. tit. 22, §§ 1861-1867 (2004 & Supp. 2006); Mass. Gen. Laws ch. 7, § 56 (1998); Minn. Stat. § 256B.47, subd. 1 (2007); N.D. Cent. Code § 50-24.4-07 (1999); Ohio Rev. Code Ann. § 5119.62 (LexisNexis 2004); R.I. Gen. Laws § 40-8.2-23 (2006).

[6] See H.B. 757, 95th Gen. Assem. (Ill. 2007); H.B. 3267, 185th Gen. Ct., Reg. Sess. (Mass. 2007); H.B. 4443, 94th Legis., 1st Reg. Sess. (Mich. 2007); H.F. 1224, 85th Legis., Reg. Sess. (Minn. 2007); S. 2701, 212th Legis. (N.J. 2007); A.B. 2222, 212th Legis. (N.J. 2006).

relief consistent with an as-applied challenge, such as an injunction against requiring Medi-Cal providers in particular to comply with the statute's certification requirement. C.A. E.R. 27. In any event, the facial/as-applied distinction does not appear to be material at this juncture of the case. While the court of appeals suggested (Pet. App. 7a, 34a, 36a) that petitioners' First Amendment claims involved a facial attack on A.B. 1889, petitioners seek review only on the question of preemption, not any First Amendment claim, and the court of appeals held that *Machinists* and *Garmon* are categorically inapplicable to A.B. 1889. Pet. App. 13a-32a, 36a. Those holdings foreclose any further facial *or* as-applied challenge to the grant and program provisions upheld here.

Although the case was decided on summary judgment and the record does not contain extensive factual detail, there appears to be sufficient information to permit an informed adjudication of petitioners' challenge to A.B. 1889 as it applies to programs like Medi-Cal. The record in this case reveals that several petitioners are long-term care facilities that receive state Medi-Cal funds "in the form of reimbursement for services provided to beneficiaries." C.A. Supp. E.R. (S.E.R.) 3; C.A. E.R. 14; see S.E.R. 46-48, 54-57, 63-66, 69-72, 736-739, 740-743. Those entities regularly submit reports of "allowable costs" to the State, and the State sets Medi-Cal reimbursement rates (a fixed amount per day per beneficiary) relying in part on those cost reports. See C.A. E.R. 48, 55-60; see also Cal. Welf. & Inst. Code §§ 14126.02, 14126.023 (West Supp. 2007); see generally California Dep't of Health Servs., *Methods and Standards for Establishing Facility-Specific Reimbursement Rates* (eff. Aug. 1, 2005) <www.dhs.ca.gov/mcs/

mcpd/RDB/LTCSDU/pdfs/SPA%2004012%202105.pdf>. Under the state Medi-Cal plan, "allowable costs do not include expenditures to assist, promote, or deter union organizing to the extent such expenditures are paid by the provider with State funds." C.A. E.R. 48-49; see *id.* at 56-59.

A.B. 1889 thus imposes a separate requirement on Medi-Cal recipients beyond the requirements of the Medi-Cal program itself:

> While A.B. 1889 regulates the manner in which Medi-Cal providers may spend state funds, it does not govern which expenditures are used to determine the prospective reimbursement rates ultimately set by the state for different classes of Medi-Cal providers statewide. The latter is instead governed by the cost reporting requirements of the State Medicaid Plan.

State's Summ. J. Reply 16. The court of appeals considered and upheld the application of A.B. 1889 to Medi-Cal funds, see Pet. App. 34a-35a & n.23, and accordingly the correctness of that determination is properly before the Court.

Respondents are correct (Br. in Opp. 20) that a "more extensive factual record" may be developed on remand, but that is not a basis for denying review. The court of appeals' decision raises pure questions of law that may be reviewed without further factual development and that resolve the preemption question with respect to A.B. 1889's grant and program restrictions. Moreover, the record contains sufficient information to permit evaluation of A.B. 1889's application to the Medi-Cal program in particular. Although the record is more sparse with respect to the application of A.B. 1889 to

grant recipients, that deficiency is unlikely to be remedied on remand, because the judgment below appears to foreclose any further preemption challenge to the grant and program provisions. The court of appeals' legal conclusions with respect to the grant provisions could be reviewed and, if appropriate, corrected, with any necessary factual details to be addressed on remand under the proper legal standard. Cf. *Engine Mfrs. Ass'n* v. *South Coast Air Quality Mgmt. Dist.*, 541 U.S. 246 (2004). Review at this stage of the proceedings is justified in light of the conflict in the circuits and the significant threat posed by A.B. 1889 and similar statutes to the uniform federal labor relations scheme.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
Counsel of Record

THOMAS G. HUNGAR
Deputy Solicitor General

NICOLE A. SAHARSKY
Assistant to the Solicitor General

RONALD MEISBURG
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

JOHN H. FERGUSON
Associate General Counsel

LINDA DREEBEN
Assistant General Counsel

KYE PAWLENKO
KEVIN FLANAGAN
Attorneys
National Labor Relations Board

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In The
Supreme Court of the United States

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, ET AL.,

Petitioners,

v.

EDMUND G. BROWN JR., in his capacity as Attorney General of the State of California, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF AMICUS CURIAE OF ASSOCIATED BUILDERS AND CONTRACTORS OF CALIFORNIA IN SUPPORT OF PETITIONER

ROBERT FRIED
Counsel of Record
THOMAS LENZ
ATKINSON, ANDELSON, LOYA, RUUD & ROMO
5776 Stoneridge Mall Road, Suite 200
Pleasanton, CA 94588
(925) 227-9200

Attorneys for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

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BRIEF OF ASSOCIATED BUILDERS AND CONTRACTORS OF CALIFORNIA AS AMICUS CURIAE IN SUPPORT OF PETITIONER

This amicus curiae brief is submitted by Associated Builders and Contractors of California, Inc. ("ABC California") in support of Petitioner United States Chamber of Commerce. Petitioners and Respondents to this action have, through their counsel of record, each consented to ABC California's filing of this brief.*

I. INTEREST OF AMICUS CURIAE

ASSOCIATED BUILDERS AND CONTRACTORS OF CALIFORNIA, Inc. ("ABC California") is a California nonprofit trade association that represents its five individual California Chapters (Golden Gate, Southern California, San Diego, Los Angeles/Ventura and Central), the California and federally approved apprenticeship and craft training programs they sponsor, and the more than 1200 predominantly open shop (non-union) individual construction company members. Among these member companies are general contractors and subcontractors that perform construction, alteration, demolition, installation, or repair work done under contract for California state agencies and for local governments and private developers that receive state financial assistance such as grants or loans.

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* The letters of consent have been filed in the office of the Clerk. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the amicus curiae, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

ABC California, which is affiliated with, but is managed independently, fully supports the amicus brief filed in this action by Associated Builders and Contractors, Inc.'s national organization ("ABC National"), a joint filing with other national organizations. ABC California's separate amicus brief in support of the Petition is intended to make the Court aware of ongoing efforts by California unions to use their statewide political influence to establish pro-union labor policies in conflict with the National Labor Relations Act through improperly regulating labor policy through manipulation of state and local government spending.

ABC California and its member chapters have played a central role in the litigation concerning the core issue presented by this case for nearly two decades. Of these numerous actions, the one of most direct relevance was the role of ABC California's member chapter(s) as an amicus and a party in *Chamber of Commerce v. Bragdon,* 64 F.3d 497 (9th Cir. 1995) and its related case, *Associated Builders & Contractors, Golden Gate Chapter Inc. v. Baca,* 769 F.Supp. 1537 (N.D. Cal. 1991), aff'd sub nom., *Chamber of Commerce v. Bragdon,* 64 F.3d 497 (9th Cir. 1995). The gravamen of these cases, like the case at bar, concerns efforts by governmental entities to regulate labor relations in the guise of an ostensibly "neutral" stated public purpose.

In this context, ABC California acknowledges it has an obligation to provide this Court its unique historical perspective on the role of union advocacy legislation such as that challenged in this case and provide what we hope is a helpful context in understanding the evolution of case precedent to assist members of the Court in reaching a conclusion that review by certiorari is urgently required.

II. POSITION OF AMICUS IN FAVOR OF GRANTING THE WRIT

Petitioner ably states the reasons why the statute under challenge transgresses federal labor law and why a fundamental conflict exists which must be resolved between the Ninth Circuit's *en banc* decision and those of the Second and Seventh Circuits. Amicus ABC of California adopts and concurs thereto.

As amicus, ABC California believes that, based on its personal experience, this case represents a historical turning point in the evolving use of legislative means to provide a structural advantage to labor in union organizing in California. As at times the primary target of such efforts, and equally as often, the primary litigant in challenges to such efforts, ABC California asks the Court to take this case up to cure the illness at its roots, by affirming a narrow statement of the principle of "market participant" and reject broad regulatory enactments that undermine federally guaranteed rights.

III. ARGUMENT IN SUPPORT OF GRANTING THE WRIT

A. How We Got To Where We Are

1. The Evolution Of Labor Protectionist Legislation In California

The initial effort to utilize legislation to further union organizing in modern California law was local ordinances in two Northern California counties whose stated "neutral" purpose was, in aid of industrial safety, to require the payment of public works prevailing wages on purely private construction projects. These ordinances were styled as "regulatory" in nature and, as noted, the identified public

purpose was intended, from the beginning, to form the basis for the enactments. The tactic of mandating union contract prevailing wages was meant to control the market and market share on the large industrial and residential projects targeted by the ordinances.

In the *Baca* and *Bragdon* cases, the trial and appellate courts concluded that use of a public policy justification was inconsistent with the rights arising under federal labor and pension law, and held the statutes pre-empted. (*See Associated Builders & Contractors, Golden Gate Chapter Inc. v. Baca, supra,* 769 F.Supp. at pp. 1544-1551; *Chamber of Commerce v. Bragdon, supra,* 64 F.3d at p. 504.)

B. Nothing Has Changed

1. "Neutrality Is A Myth"

The antithesis of public regulation is private contract. Out of this perspective was born the next effort by organized labor to advance its market share in the form of the so-called "project labor agreement." These agreements, executed between a government entity and a group of labor unions, were, like the private prevailing wage ordinances, creatures of the construction labor marketplace. The concept behind them was to avoid characterization as general regulation at all costs and, instead, to seek validation in the courts as private agreements, made by a municipality as if it were a private participant in the economic marketplace, for its own purposes. In this context, what is most striking about the *en banc* decision of the Ninth Circuit is that all pretense of drawing out the analytical difference between public "regulation" and

private "agreement" has been abandoned. (*Chamber of Commerce v. Lockyer*, 463 F.3d 1076, 1084 (9th Cir. 2006).)

"Market participation" means free play of economic forces can only occur in the context of federally guaranteed rights without a preemptive effect where the regulatory decision is negotiated case-specific action taken by an entity, notwithstanding that, independently, it might otherwise seek to act as a regulator. Therefore, if a Court, as the Ninth Circuit did, concludes that the "market participant" exception does not apply, it necessarily concludes that federal labor law preemption does. This was the gravamen of the Ninth Circuit's decision in *Bragdon*, and is, it is submitted, the better view.

In truth, it is made plain in the opinion below that the Ninth Circuit, after two contrary decisions of previous panels of the Court, now believes the State of California, in enacting the statute at issue, was exercising its "right to control allocation of tight resources." (*Lockyer*, *supra*, 463 F.3d 1076, 1095.) The problem, of course, is that there is no power of the purse inherent in the State of California where the effect of the "allocation of tight resources" is to limit federally guaranteed labor law rights.

IV. CONCLUSION

As argued by the Petitioner, and supported by the foregoing additional reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

ROBERT FRIED
THOMAS LENZ
ATKINSON, ANDELSON, LOYA,
RUUD & ROMO
5776 Stoneridge Mall Road,
Suite 200
Pleasanton, CA 94588
(925) 227-9[illegible]0
Attorneys for Amicus Curiae

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On Petition For Writ of Certiorari To The United States Court of Appeals For The Ninth Circuit

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JOINT BRIEF OF *AMICI CURIAE*, ASSOCIATED BUILDERS AND CONTRACTORS, INC., THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS LEGAL FOUNDATION, THE AMERICAN HOSPITAL ASSOCIATION, THE AMERICAN HEALTH CARE ASSOCIATION AND THE NATIONAL CENTER FOR ASSISTED LIVING, THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT AND THE COUNCIL ON LABOR LAW EQUALITY, IN SUPPORT OF THE PETITION

Maurice Baskin
(*Counsel of Record*)
James E. Fagan, III
Venable LLP
575 7th St., N.W.
Washington, D.C. 20004
202-344-4823
Counsel for *Amici Curiae*

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INTERESTS OF THE *AMICI* [1]

The *Amici* are jointly filing this brief in support of the Petition in order to bring to this Court's attention the serious threat to the balance of interests under federal labor law presented by the decision of the Ninth Circuit. The *Amici* represent small businesses, human resource managers, and providers of services from across a broad spectrum of industries. Many of the *Amici's* members receive funds from state and local governments, both in California and throughout the country, in the course of providing valuable services to state and local residents. At the same time, the private business recipients of such funds remain employers covered by the National Labor Relations Act, who interact with their employees under legal principles and protections specified in that preemptive federal law.

Associated Builders and Contractors, Inc. ("ABC National") is a national trade association of more than 24,000 construction contractors and related firms. ABC's members share the view that work should be awarded and performed on the basis of merit, regardless of labor affiliation. ABC members include both non-union and unionized firms, many of whom perform work on government-funded projects. ABC filed a brief as *amicus curiae* in the Ninth Circuit on behalf of the Petitioners in this case, expressing the view that California's AB 1889 infringes on the right of employers to communicate with their employees in a manner protected by the National Labor Relations Act.

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[1] Pursuant to Supreme Court Rule 37.6, the *Amici* state that this brief was not prepared, written or produced by any person or entity other than the *Amici* or their counsel. Amici further state that all parties to the Petition have consented to the filing of this brief, and letters evidencing such consent are being filed with the Court pursuant to Rule 37.2.

The National Federation of Independent Business Legal Foundation ("NFIB Legal Foundation"), a nonprofit, public interest law firm established to be the voice for small business in the nation's courts and the legal resource for small business, is the legal arm of the National Federation of Independent Business (NFIB). NFIB is the nation's leading small-business advocacy association, with offices in Washington, D.C. and all 50 state capitals. As a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses. The NFIB Legal Foundation frequently files *amicus* briefs in the courts informing judges how the decision they make in a given case will impact small businesses nationwide.

The AHA is a national not-for-profit association that represents the interests of nearly 5,000 hospitals, health care systems, networks and other care providers, as well as 37,000 individual members, all of whom are committed to finding innovative and effective ways of improving the health of the communities they serve. The AHA educates its members on health care issues and trends and advocates on their behalf in state and federal legislative, regulatory and judicial fora to ensure that its members' perspectives and needs are understood and taken into account in the formulation of policy.

The American Health Care Association and the National Center for Assisted Living are the nation's leading long term care organizations. AHCA/NCAL and their membership are committed to performance excellence and Quality First, a covenant for healthy, affordable and ethical long term care. AHCA/NCAL represent more than 10,000 non-profit and proprietary facilities dedicated to continuous improvement in the delivery of professional and compassionate care provided daily by millions of caring employees to more than 2.5 million of our nation's frail,

elderly and disabled citizens who live in nursing facilities, assisted living residences, sub-acute centers and homes for persons with mental retardation and developmental disabilities.

The Society for Human Resource Management (SHRM) is the world's largest association devoted to human resource management. Representing more than 210,000 individual members, the Society's mission is to serve the needs of HR professionals by providing the most essential and comprehensive resources available. As an influential voice, the Society's mission is also to advance the human resource profession to ensure that HR is recognized as an essential partner in developing and executing organizational strategy. Founded in 1948, SHRM currently has more than 550 affiliated chapters within the United States and members in more than 100 countries.

The Council on Labor Law Equality (COLLE) is a national association of top labor relations executives and in-house counsel dedicated to maintaining a fair and balanced national labor policy. COLLE monitors the activities of the National Labor Relations Board (NLRB) and court decisions relating to the National Labor Relations Act (NLRA) and participates as an *amicus* in important cases affecting national labor law.

As further explained below, the *Amici* are jointly filing this brief in order to advise the Court of the significant adverse impact of the Ninth Circuit's decision on private sector labor relations throughout the United States, due to the pervasive nature of state and local government-funded programs all over the country. The *Amici's* brief will assist the Court in reviewing the issues raised by the Petition, because the *Amici*, representing many industries and interests, have broad familiarity with state-funded programs

and the likely adverse impact of AB 1889 on employer communications with employees.

The ruling below improperly blurs the distinction between permissible state market participation and prohibited state regulation of labor policy. As a result, the Ninth Circuit has upheld a state law here that directly infringes on the protected speech of private employers, in contravention of the NLRA. The Petition should be granted so that this Court can review and resolve the conflict in the circuits regarding the legality of this type of state law, which is an issue of great public importance.

SUMMARY OF ARGUMENT

The Ninth Circuit's decision upholding California's Assembly Bill No. 1889, Cal. Gov't Code §§ 16645-16649 (collectively, "AB 1889"), threatens to significantly undermine the National Labor Relations Act (NLRA), by allowing state and local governments to use their spending powers to impose regulatory labor policies on large numbers of private employers and employees under the guise of maintaining state "neutrality." The scope of state and local spending potentially affected by the appeals court's ruling is staggering, totaling trillions of dollars annually in California and in the numerous other states that are considering similar legislation.

The *Amici* submit that the Ninth Circuit significantly understated the impact of AB 1889's administrative, accounting and reporting requirements on the ability of small businesses to communicate with their employees on the subject of labor relations. Many of the private employers who receive such funds, including many of the *Amici's* members, are small businesses who are completely reliant on government grants. Such employers have not previously been held to lose their protected federal rights under the

NLRA merely by accepting state funds and providing services benefiting state residents. The Ninth Circuit, however, in direct conflict with decisions of the Second and Seventh Circuits,[2] has so held in the present case.

The Ninth Circuit also improperly interpreted the NLRA as somehow failing to protect the rights of employers to communicate with their employees on the important subject of labor relations, and the rights of employees to receive such information, under the plain language of Section 8(c) of the NLRA. The court's holding presents another direct conflict with the Second Circuit's decision and with the National Labor Relations Board and further conflicts with this Court's own longstanding interpretation of the Act.

Finally, the Ninth Circuit's holding that California's use of its spending power to regulate employer speech does not violate either of this Court's settled doctrines of labor law preemption, known as "*Garmon*" and "*Machinists*" preemption respectively, is plainly wrong. AB 1889 is preempted under both doctrines. The Ninth Circuit's failure to so hold creates additional conflicts with precedents of this Court and other courts of appeals, which must be resolved.

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[2] *Healthcare Association of New York State, Inc v. Pataki*, 471 F.3d 87 (2nd Cir. 2006); *Metropolitan Milwaukee Ass'n of Commerce v. Milwaukee County*, 431 F.3d 277 (7th Cir. 2005).

REASONS FOR GRANTING THE PETITION

I. THE PETITION'S CHALLENGE TO CALIFORNIA'S IMPROPER REGULATION OF PROTECTED SPEECH IN VIOLATION OF FEDERAL LABOR LAW PRESENTS AN ISSUE OF GREAT IMPORTANCE TO BOTH EMPLOYERS AND EMPLOYEES

A. Absent Correction By This Court, The Ninth Circuit's Erroneous Decision Will Adversely Affect The Expenditure of Trillions Of Dollars Of State And Local Funds Throughout The Country.

In *Wisconsin Dept. of Indus., Labor & Human Relations v. Gould, Inc.*, 475 U.S. 282, 287 (1986), this Court held that "[state] spending power may not be used as a pretext for regulating labor relations." In the present case, the Ninth Circuit found that AB 1889 constituted state regulation of labor policy, "sweep[ing] broadly" beyond the state's proprietary interests and plainly impacting upon private employers covered by the NLRA. Pet. App. 11a-12a. The Ninth Circuit's failure to find AB 1889 to be preempted under such circumstances, in direct conflict with holdings of the Second and Seventh Circuits and the stated views of the National Labor Relations Board, creates an issue of extraordinary importance which this Court should resolve by granting review of the Petition. Absent review by this Court, the Ninth Circuit's decision will open the door to pervasive state regulation of private sector labor relations, undermining the NLRA through spending restrictions modeled on AB 1889.

At the outset, the Ninth Circuit failed to address the broad scope of state spending covered by this law. In Fiscal Year 2007-08, the state of California is expected to spend

more than $130 billion on grants and contracts. *See* Schedule 10 – Summary, http://www.ebudget.ca.gov/BudgetSummary/SCD/1249579.html. Thousands of private employers in virtually every service, manufacturing and construction category are the recipients of such state funds, including many small business members of the *Amici*.

Throughout the country, state spending as a whole has dramatically increased in recent decades, and now exceeds a trillion dollars per year. *See* U.S. Census Bureau, Table 1: State and Local Government Finances Level of Govt. and By State,www.census.gov/govs/estimate/0200ussl_1.html Local government spending is nearly double that of the states themselves, adding trillions more to the total. *Id.*

State spending on Medicaid represented the single largest increase in state expenditures in the 1990s, growing nearly 150 percent. Snell, *State Spending in the 1990s, National Conference of State Legislatures* (2003), http://www.ncsl.org/programs/fiscal/stspend90s.htm. Another recent study found that total state spending on healthcare in fiscal year 2002 amounted to more than $290 billion, of which Medicaid expenditures accounted for $201 billion. *See* "State Health Care Expenditure Report," Milbank Memorial Fund, the National Association of State Budget Officers, http://www.milbank.org/reports/2000shcer/index.html.[3]

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[3] New York's 2006-07 state budget appropriated more than $45 billion for spending on Medicaid. *See* 2006-07 Budget Rep. 40-43, http://www.budget.state.ny.us/pubs/enacted/enacted.html. An analysis conducted by the Florida Senate found that the Medicaid program funded approximately two-thirds of the resident days in Florida nursing homes. *See* "Senate Staff Analysis and Economic Impact Statement, SB 1378" (2002),www.leg.state.fl.us/data/session/2002/Senate/bills/analysis/pdf/2002s1378.hc.pdf.

Even these levels of spending are exceeded by state and local expenditures on education and capital outlays, including construction. Other categories of state and local spending that frequently are distributed to private employers in order to obtain needed services include social services, hospitals, transportation, corrections, and the environment. *See* U.S. Census Bureau, *supra*, Table 1.

The nationwide expenditures by state and local governments take on added significance when it is recognized that California's AB 1889 has become the model for similar state and local legislation elsewhere. In December 2002, New York became the second state to enact labor neutrality legislation. *See* N.Y. Labor Law § 211-a. As noted by the Second Circuit in *Healthcare Assn of N.Y. State, Inc. v. Pataki*, 471 F. 3d 87 (2d Cir. Dec. 5, 2006), the New York Labor Law is very similar to the California provision and obviously modeled after AB 1889.[4]

In addition to California and New York, the following states have recently considered legislation similar to AB 1889: Arizona HB 2503 (2001) and HB 2548 (2002) (restricting the use of state funds by state contractors); Colorado SB 130 (2002) (same); Connecticut SB 763 (2001)(same); Georgia SB 271 (1999)(restricting the use of state funds by employers); Hawaii, "Bill to Provide for State Neutrality in Union Organizing" (2003); Illinois HB 726 (2001)(prohibiting the recipients of state funds from using those funds to promote, assist, or deter unionization), HB

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[4] A statute has also been recently enacted in Florida, applicable only to health care grant recipients, and providing, *inter alia*, that: "[a]ny expense, including, but not limited to, legal and consulting fees and salaries of supervisors and employees, incurred for activities directly relating to influencing employees with respect to unionization shall not be an allowable cost for Medicaid cost reporting purposes." Florida Public Health Code 440.443(1).

3395 (2003)(restricting the use of state funds, requiring that unions be given equal access to employees, and prohibiting captive meetings during working hours); Indiana Bill 1980 (2001)(prohibiting any employer with a reimbursement agreement with the state from using state funds to support or oppose unionization); Iowa HJ 215/256, HF 126 (2001) (prohibiting use of state funds by employer that was reimbursed by the state, received grants from the state, had contracts with state, or participated in state programs); Louisiana SB 1078 (2001)(prohibiting employers from using state funds to assist, promote or deter unionization); Missouri HB 1816 (2000) (same), HB 2209 (2002) (same), HB 308 (2003) (same); New Hampshire SB 162 (2002)(limiting use of state funds by private contractors; specifies prohibited activities, including using state funds to "defend against unfair labor practice charges"); New Jersey Executive Order 20 (2002)(requiring card check and neutrality from state contractors that provide uniforms for state employees), AB 2958 (2002)(prohibit the use of state funds to pay consultants train supervisors, or pay salaries of other employees whose primary responsibility is union avoidance); North Dakota SB 2434 (2001)(providing limits on use of state funds for union organizing); Oregon HB 3645; S 778/776 (2001) (prohibiting the use of state funds to encourage or discourage unionization), SB 494-A (2003)(prohibiting the use of state funds to oppose or support union organizing efforts), SB 975 (2005)(restricting the use of state funds by state contractors); Pennsylvania HB 1531/1659 (2001)(restricting the use of state funds by state contractors); Tennessee HB 20, SB 413 (2005) (prohibiting the use of state funds for the assistance, promotion or deterrence of labor organizations); Washington

HB 2016 (2003)(prohibiting the use of state funds to encourage or discourage unionization.[5]

As this Court has recognized in the past, little will be left of the NLRA's regulatory scheme if each state is free to use its spending power to impose its labor policy views on private sector employers. *Gould,* 475 U.S. at 288-89. The free speech rights of many private employers covered by the NLRA, who receive state and local funds not only in California but also in the other states listed above, depend on this Court's review of the Petition in this case. The proliferation of state legislation around the country modeled on AB 1889, combined with the trillions of dollars of state and local spending that could be adversely affected by the Ninth Circuit's erroneous opinion, clearly demonstrates the national importance of the issue presented here, and argues strongly for granting the Petition.

B. Contrary To The Ninth Circuit's Decision, AB 1889 Will Have A Significant Adverse Impact On The Federally Protected Right Of Small Businesses To Communicate With Their Employees.

The importance of this case and the need for review of the Petition are underscored by the magnitude of AB 1889's coercive impact on employers. The Ninth Circuit greatly understated the effects of AB 1889 on the ability of covered employers to communicate effectively with their employees in a manner protected by the NLRA. The Ninth Circuit found that AB 1889's effect on employer speech was

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[5] Enactment of AB 1889 has also encouraged local jurisdictions to impose new restrictions on recipients of government funds favoring unionization in the construction industry. *See Johnson v. Rancho Santiago Community College District*, Case No. SACV 04-280 JVS (S.D. Cal.) (stayed pending the outcome of this appeal).

"indirect and incidental," when the reality is more consistent with the dissent's view that the statute imposes "seemingly impossible compliance burdens." Pet. App. 4a-5a, n.2, 17a-18a, n.10.

The Ninth Circuit ignored substantial record evidence that many California employers receive all or virtually all of their operating revenues from the state for services provided under state programs. According to the record before the court, for example, over 500 employers in California rely exclusively upon Medi-Cal reimbursements, covered by AB 1889, for their operating revenue. Dkt. 118 (SER 499-525). One such employer, Zilaco, Inc., submitted an affidavit to the district court declaring without contradiction that 100% of one of its facility's revenues was dependent on Medi-Cal, while a second facility was 90% dependent on state funds. Dkt. 43 (SER 70-72). The employer was compelled to abandon all communications with its employees on the subject of unionization, after passage of AB 1889, as a matter of "survival." *Id.* Many of the *Amici's* members, in California and elsewhere, will be presented with the same draconian choice if the Ninth Circuit's decision is allowed to stand.

Many more employers, who have independent revenue streams but nevertheless accept state and local funds, will still face severe burdens if compelled to comply with the restrictions of AB 1889. Such employers will be required to segregate accounts and establish separate accounting systems to track each expenditure relating to union organizing. Absent such separation, as to which the law offers no guidance whatsoever, the challenged statute entitles the state to *presume* a violation on the part of the employer. Cal. Govt. Code 16646(b).

As construction industry representatives testified in California, AB 1889 poses "mammoth practical accounting

problems." Dkt. 119 (SER 612). "This is an accounting nightmare for all small business people, including subcontractors in as diverse fields as landscape contractors who would have as simple a job as reseeding a local football field, to large general contractors." *Id.* Similarly, a health care provider stated in an affidavit that "we determined that in order to attempt to comply with the accounting and record-keeping requirements of AB 1889, we would have to fundamentally and substantially alter our financial accounting and record-keeping." Dkt. #37 (SER 57).

The adverse effects of AB 1889 are thus not limited to the particular state programs for which state funds are received. In order to avoid onerous administrative costs and potential litigation, many employers receiving state funds under AB 1889 believe it necessary to cease all communications with employees on both state-funded and non-state projects, due to the difficulty of proving that no state funds have been commingled with non-state operations. A skilled nursing provider testified to the district court that "the burden and cost associated with [the necessary accounting] change was so extreme that we decided that we could not afford it." Dkt. #41 (SER 66).

The coercive effects of AB 1889 are magnified by the creation of private causes of action against offending employers, causing them to face the prospect of litigation costs and potential treble damages if they risk any employee communications. *Id.* at 16645.8. *See also* Statement of California Landscape Contractors Assn, Mar. 27, 2000. Dkt. 119 (SER 610) ("[The law's] fuzzy language is an open invitation to endless litigation about how individual employees perceived an employer's feelings about unionization.").

Indeed, the record of enforcement of the California statute reflects exactly such a coercive impact on employers'

exercise of their free speech rights. Unions filed numerous court complaints against employers under the law in 2001-2, claiming improper uses of state funds on non-state programs. Dkt. 30 (SER 26-45). Rather than confront the administrative and judicial costs of defending such complaints, a number of employers either stopped all communications with their employees or avoided entering into state contracts.[6]

In the face of such record evidence, the Ninth Circuit's holding that AB 1889's impact was "indirect," "incidental," and insufficient to impinge on federally protected rights, was clearly erroneous. Moreover, the Ninth Circuit's opinion directly conflicts with the findings of the Second Circuit and Seventh Circuit when faced with similar state laws.

In *Healthcare Ass'n of N.Y. State, Inc. v. Pataki*, *supra*, 471 F. 3d at 105, the Second Circuit held that state funding restrictions may in fact "deter employers from the exercise of their rights," to the extent that the state imposes restrictions on private employers' use of proceeds earned in which the contractor's labor costs cannot affect the amount of expense to the state.[7]

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[6] In one example cited to the Ninth Circuit, a California hospital felt compelled to waive its right to a secret ballot NLRB election immediately after the union filed a complaint against the hospital's use of state funds. Dkt. #75 (SER 364-370).

[7] The *Amici's* citation to the Second Circuit's conflicting holding is not intended to express complete agreement with that court's analysis of all the possible circumstances in which state funding restrictions should be found preempted by federal law. As the Second Circuit itself noted, its analysis differs from both the majority and dissenting opinions of the Ninth Circuit, highlighting further the need for this Court to clarify the law.

The Seventh Circuit, in *Metropolitan Milwaukee Assn of Commerce v. Milwaukee County, supra*, 431 F. 3d 277, held that it was necessary to analyze any possible impact of state funding restrictions that extended beyond the scope of the particular funded program. The court deemed this "spillover effect" to be fatal to any state funding restrictions on otherwise protected employer rights because of the "sheer impracticability of a separation between [government] and other work." AB 1889 unquestionably has the same "spillover effects" on state funding recipients that were present in *Metropolitan Milwaukee*, but the Ninth Circuit ignored them.

The Ninth Circuit's failure to properly analyze AB 1889's coercive impact on the exercise of employer rights in this case directly conflicts with each of the above-referenced circuit court holdings, and with this Court's seminal opinion in *Gould*. The Ninth Circuit's erroneous analysis of the magnitude of AB 1889's impact on private sector labor relations, and the circuit conflict created thereby, constitutes further grounds for granting the Petition.

C. The Ninth Circuit's Decision Creates Significant Conflicts In The Doctrine Of Federal Labor Law Preemption And Undermines Enforcement Of The NLRA.

The Ninth Circuit's failure to appreciate the severity of AB 1889's coercive impact on employers led to further error in the appeals court's application of this Court's labor law preemption doctrine to the California law. Having found the challenged statute to constitute "broadly sweeping," non-proprietary regulation of labor relations policy, the Ninth Circuit should have held that AB 1889 was preempted by the NLRA under this Court's holdings in *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959), and/or *Lodge 76, Int'l Assn of Machinists & Aerospace Workers v.*

Wis. Employment Relations Comm'n, 427 U.S. 132 (1976). The Ninth Circuit's failure to find preemption under either *Garmon* or *Machinists* cannot be reconciled with the conflicting holdings of the Second and Seventh Circuits and again requires review by this Court.[8]

The appeals court's analysis improperly blurs the distinction previously established by this Court between permissible state market participation and prohibited state regulation of labor policy. *See Bldg. & Constr. Trades Council of the Metro. Dist. v. Associated Builders and Contractors of Mass./R.I., Inc.*, 507 U.S. 218 (1993). Contrary to the Ninth Circuit's holding, AB 1889 plainly regulates speech that the NLRA protects, prohibits, or arguably protects or prohibits within the meaning of *Garmon*, and further regulates conduct that Congress intended to be left unregulated under the holding of *Machinists*. On either ground, or both, the Petition should be granted and the Ninth Circuit decision should be reversed.

1. *Garmon* Preemption.

Under *Garmon*, this Court has repeatedly preempted regulation of activity that "the NLRA protects, prohibits, or arguably protects or prohibits." *Gould*, 475 U.S. at 286. The theory behind *Garmon* preemption is the protection of the centralized administration of national labor policy. *See Garmon*, 359 U.S. at 242.

As the Second Circuit squarely held in *Healthcare Assn, supra*, 471 F. 3d at 106, "Section 8(c) of the NLRA

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[8] While ultimately acknowledging that AB 1889 is regulatory in nature, as it clearly is, the Ninth Circuit committed further error by improperly narrowing the categories of state actions that can be found to be regulatory, in conflict with (though purporting to apply) the holding of the Fifth Circuit in *Cardinal Towing & Auto Repair, Inc. v. City of Bedford*, 180 F. 3d 686, 693 (5th Cir. 1999).

protects an employer's right to direct non-coercive speech to their employees during the course of a union campaign." Yet the Ninth Circuit declared that non-coercive speech is not "protected" by the NLRA but is instead guaranteed only by the First Amendment. Pet. App. 23a. The Second Circuit properly rejected the Ninth Circuit's interpretation of the Act, as follows:

> Many courts, including this one, have affirmed that section 8(c) not only protects constitutional speech rights, but also serves a labor law function of allowing employers to present an alternative view and information that a union would not present.

Id. at 98-99. As the Second Circuit further articulated, the language of Section 8(c) not only was intended to protect employers but also to insure that *employees* had access to information from both sides of the labor debate during any organizing campaign. *Id.* at 99. *See also NLRB v. Pratt & Whitney Air Craft Div.*, 789 F. 2d 121, 134 (2d Cir. 1986) ("Granting an employer the opportunity to communicate with its employees does more than affirm its right to freedom of speech; it also aids the workers by allowing them to make informed decisions while also permitting them a reasoned critique of their unions' performance."); *Americare Pine Lodge Nursing & Rehab. Ctr. v. NLRB*, 164 F. 3d 867, 875 (4th Cir. 1999) ("[P]ermitting the fullest freedom of expression by each party nurtures a healthy and stable bargaining process."); *Southwire Co. v. NLRB*, 383 F. 2d 235, 241 (5th Cir. 1967) ("The guaranty of freedom of speech and assembly to the employer and to the union goes to the

heart of the contest over whether an employee wishes to join a union.").[9]

The Second Circuit's contradiction of the Ninth Circuit's holding as to the purpose of Section 8(c), and the above-cited statements from several other circuits that are likewise inconsistent with the Ninth Circuit's opinion, are amply supported by this Court's own precedents. *See Linn v. United Plant Guard Workers of Am.*, 383 U.S. 53 (1966) ("The enactment of Section 8(c) manifests a congressional intent to encourage free debate on issues dividing labor and management."); *NLRB v. United Steelworkers of Am.*, 357 U.S. 357, 362 (1958) (referring to non-coercive anti-union solicitation as a "right protected by the so-called 'employer free speech' provision of Section 8(c) of the [Act]"). The Ninth Circuit failed to address these precedents, and the appeals court's constrained reading of Section 8(c) plainly requires review and correction by this Court.

The Ninth Circuit's holding also directly conflicts in this regard with the Seventh Circuit decision in *Metropolitan Milwaukee*. The Seventh Circuit there found preempted under *Garmon* and *Gould* a County ordinance that forbade contracting employers from holding meetings "intended to influence an [employee's] decision in selecting or not selecting a bargaining representative." 431 F.3d at 280. The Court specifically determined that the NLRA granted the right to employers to hold meetings in order to educate employees on the issue of labor representation. *Id.*

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[9] Even the Ninth Circuit has declared that "collective bargaining will not work, nor will labor disputes be susceptible to resolution, unless both labor and management are able to exercise their right to engage in uninhibited, robust, and wide-open debate." *Steam Press Holdings, Inc. v. Hawaii Teamsters*, 302 F. 3d 998, 1009 (9th Cir. 2002).

2. *Machinists* Preemption.

Equally misguided is the Ninth Circuit's holding that *Machinists* preemption does not apply to AB 1889. Under *Machinists*, this Court requires preemption of any state regulation of activity that Congress intended to be governed "by the free play of economic forces." 427 U.S. 132, 140. *See also Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 110-11 (1989). The Ninth Circuit nevertheless found that non-coercive employer speech was not intended to be "free from all regulation" under *Machinists* because the NLRB does regulate *coercive* campaign speech. Pet. App. 19a.

Again, the Second Circuit has contradicted the Ninth Circuit's analysis and has cogently explained why the latter court is wrong:

> Because the protection afforded by Section 8(c) is to leave employer speech largely unregulated, in a case involving section 8(c), the *Garmon* doctrine and *Machinists* doctrine actually tend towards the same point: requiring [the state] to respect Congress intent to "leave some activities unregulated," *Machinists*, 427 U.S. 144, so that the parties may resolve their disputes by use of the economic weapons left to them.

Healthcare Association of New York State, Inc. v. Pataki, supra, 471 F. 3d at 107. *See also Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724, 751 (1985) ("For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if a state were to declare picketing free for purposes or by methods which the federal Act prohibits.").

As explained above, the Ninth Circuit primarily justifies the state's admitted regulation of employer conduct by returning to the contention that employers are free to forgo the state funds and engage in any speech permitted by the NLRA. Pet. App. 17a. As both the Second Circuit, the Seventh Circuit, and this Court have held, however, the exercise of state spending power to regulate private sector labor policy can result in impermissible conflict with federal labor law by deterring employers in the exercise of their rights under the NLRA. *Healthcare Association, supra,* 471 F. 3d at 107; *Metropolitan Milwaukee, supra*, 431 F. 3d at 277; *Gould*, 475 U.S. at 286. *See also Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 548 (2001) (restrictions on lawsuits by private grantees deemed unconstitutional even when grantees were free to engage in such lawsuits with their own funds). Plainly, such deterrence is caused by the broadly sweeping provisions of AB 1889, such that review of the Petition should be granted and the conflicting opinions resolved.

Finally, the Second Circuit also properly rejected the Ninth Circuit's reliance on *Rust v. Sullivan*, 500 U.S. 173 (1991), a decision of this Court that upheld certain abortion-related restrictions on the uses of *federal* grants based upon constitutional grounds having no relevance to issues of labor law preemption of state funding restrictions. *Healthcare Association, supra,* 471 F.3d at 102. The Second Circuit noted that while in cases such as *Rust*, it may be constitutional for the federal government to make a "value judgment favoring conduct other than the exercise of a protected right" and to restrict the use of public funds to exclude that protected conduct, *Gould* prohibits a state from "leveraging its money to affect the contractor's protected activity beyond the contractor's dealings with the State." As this Court further held in *Gould,* the question of constitutional limits on federal spending "is an entirely different question from what States may do with the

[National Labor Relations] Act in place." 475 U.S. at 290. The Ninth Circuit thus committed further error in this case, necessitating review and correction by this Court, by importing the inapposite Constitutional holding of *Rust* into the unrelated doctrine of federal labor law preemption.

CONCLUSION

For the reasons set forth above and in the Petition, the Petition should be granted.

Respectfully submitted,

Maurice Baskin
(*Counsel of Record*)
James E. Fagan, III
Venable LLP
575 7th St., N.W.
Washington, D.C. 20004
202-344-4823

Counsel for *Amici Curiae*

(4)

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IN THE

Supreme Court of the United States

CHAMBER OF COMMERCE OF THE UNITED STATES *et al.*,

Petitioners,

v.

BILL LOCKYER *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICI CURIAE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC. AND SHERWOOD COX IN SUPPORT OF THE PETITIONERS

Glenn M. Taubman*
c/o National Right to Work Legal
Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, VA 22160
(703) 321-8510

March 2007

*Counsel of Record for *Amici Curiae*

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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INTEREST OF THE *AMICI*[1]

The National Right to Work Legal Defense Foundation, Inc. ("Foundation") is a charitable, legal aid organization formed to protect the Right to Work, freedoms of association and speech, and other fundamental liberties of ordinary working men and women from infringement by compulsory unionism. Through its staff attorneys, the Foundation aids employees who have been denied or coerced in the exercise of their right to refrain from collective activity. The Foundation's staff attorneys have served as counsel to individual employees in many Supreme Court cases involving employees' right to refrain from joining or supporting labor organizations, and thereby have helped to establish important precedents protecting employee rights in the workplace against the abuses of compulsory unionism. These cases include: *Davenport v. Washington Education Ass'n*, No. 05-1589 (U.S. argued Jan. 10, 2007); *Air Line Pilots Ass'n v. Miller*, 523 U.S. 866 (1998); *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991); *Communications Workers v. Beck*, 487 U.S. 735 (1988); *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986); *Ellis v. Railway Clerks*, 466 U.S. 435 (1984); and *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977).

Most recently, the Foundation's legal aid program has been at the forefront of exposing the true nature of so-called "neutrality and card check" agreements, which lie at the heart of this litigation over California's "neutrality" statute. *See, e.g., Dana Corp.*, 341 N.L.R.B. 1283 (2004); *Patterson v. Heartland Indus. Partners, LLP*, 428 F. Supp. 2d 714 (N.D. Ohio 2006), *appeal docketed*, No. 06-3791 (6th Cir. May 15, 2006).

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[1] Pursuant to Supreme Court Rule 37.6, *Amici* state that this brief was written and produced solely by the *Amici* and their counsel. No counsel for a party authored the brief in whole or in part.

Under many common "neutrality" agreements, employers' speech is silenced, unions are provided with employees' home addresses and other personal information, and secret-ballot elections supervised by the National Labor Relations Board ("NLRB") are waived in favor of so-called "card checks." Under these arrangements, employees are often pressured to sign union authorization cards that are counted as "votes" in favor of unionization. These provisions, and the state statutes that mandate them, strike at the heart of employees' right to choose or refrain from unionization under § 7 of the National Labor Relations Act ("NLRA" or "Act"), 29 U.S.C. § 157. The Foundation and its supporters want to ensure that this Court, as it considers this important Petition for Writ of Certiorari, understands the manner in which these state mandated "neutrality" schemes are created, enforced, and abused to hinder employees' exercise of their § 7 right to choose or reject unionization.

Sherwood Cox is a registered nurse employed by Western Medical Center Santa Ana, an acute care hospital located in Orange County, California. He is affected by the California state law at issue because his employer may be a recipient of state funds and has a "neutrality agreement" with the California Nurses Association ("CNA"). That "neutrality agreement" grants CNA several exclusive privileges and powers that enable it–above all other unions–to become the nurses' collective bargaining representative. Mr. Cox has been forced to file numerous unfair labor practice charges against his employer and the CNA to protect his § 7 rights from abridgement by their neutrality agreement. By filing this brief as *amici curiae*, Mr. Cox seeks to protect his and all other employees' § 7 right to choose or reject unionization in an informed and intelligent manner.

Pursuant to Supreme Court Rule 37.2(a), *Amici* state that all Respondents have granted written consent to the filing of this brief.

QUESTION PRESENTED

The *Amici* adopt and incorporate by reference the Petitioners' Question Presented.

STATEMENT OF THE CASE

The *Amici* adopt and incorporate by reference the Petitioners' Statement of the Case.

SUMMARY OF THE ARGUMENT

Assembly Bill No. 1889 ("AB 1889") is the law at issue here. It is a state labor regulation that has only one purpose and effect: to halt the free flow of non-coercive information from employers to their employees, so that unions may take advantage of the enforced silence and corral uninformed employees into unionization. AB 1889's "gag rule" directly conflicts with federal labor policy, which encourages the free flow of non-coercive information precisely so that employees can make an intelligent and fully informed decision to choose or reject unionization. Employees are the real victims of this misguided state effort to undo federal labor policy.

AB 1889 also enables unions to demand and receive so-called "neutrality and card check" agreements, under which employees' right to choose or reject unionization in a free and uncoerced manner is further hampered. AB 1889 fails to pass muster and must be deemed preempted under both *Lodge 76, International Ass'n of Machinists & Aerospace Workers v. Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976) ("*Machinists*") and *San Diego Building Trades Council*

v. Garmon, 359 U.S. 236 (1959) ("*Garmon*"). Therefore, the Petition for Writ of Certiorari should be granted in this important case.

REASONS FOR GRANTING THE WRIT

Federal Labor Law Has One Core Policy: Allowing Employees to Choose or Reject Unionization in an Intelligent, Free and Uncoerced Manner. AB 1889 Eviscerates This Policy by Silencing the Non-Coercive Speech of One of the Key Participants in the Debate Over Unionization. For This Reason the Statute Is Preempted under Both the "Machinists" and "Garmon" Branches of This Court's Preemption Doctrine.

I. Introduction

California Assembly Bill No. 1889 and Cal. Gov't Code §§ 16645-16649 ("AB 1889") are state-enforced "neutrality" regulations. Despite their name, however, these regulations are anything but neutral. "[AB 1889] carries a false air of evenhandedness." *Chamber of Commerce of the United States v. Lockyer*, 463 F.3d 1076, 1102 (9th Cir. 2006) (en banc) (Beezer, J., dissenting) (Pet. App. 44a); *see also Chamber of Commerce of the United States v. Lockyer*, 422 F.3d 973, 978 (9th Cir. 2005) (Pet. App. 58a, 64a). This is so because statutes like AB 1889 have one true purpose and effect: to halt the free flow of non-coercive information from employers to their employees, so that unions may take advantage of the enforced silence to corral the uninformed employees into unionization. This "gag rule" against one party directly conflicts with federal labor policy, which encourages the free flow of non-coercive information precisely so that employees can make an intelligent and fully informed choice about unionization. Congress surely intended such non-coercive speech to be left to the free flow of economic forces, for any

effort to silence such speech would doom the entire NLRA to unconstitutionality. *See NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969).

The Petitioners' brief ably and correctly demonstrates that the Ninth Circuit's en banc ruling upholding AB 1889 is erroneous and conflicts with numerous decisions of this Court that have found state interference with the NLRA preempted in many circumstances. AB 1889's ban on non-coercive employer speech directly conflicts with longstanding federal labor policy that free speech and debate by all parties is central to the purposes of the NLRA. *Thomas v. Collins*, 323 U.S. 516, 532 (1945) ("The right . . . to discuss, and inform people concerning, the advantages and disadvantages of unions and joining them is protected not only as part of free speech, but as part of free assembly."); *Linn v. United Plant Guard Workers of America, Local 114*, 383 U.S. 53, 62 (1966), *quoting New York Times v. Sullivan*, 376 U.S. 254, 270 (1964) (in a union organizing context, "cases involving speech are to be considered 'against the background of a profound . . . commitment to the principle that debate . . . should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks'"). Indeed, "[a]n overriding principle of the NLRA is that the collective bargaining process cannot function unless both employers and employees have the ability to engage in open and robust debate concerning unionization." *Lockyer*, 463 F.3d at 1105 (Beezer, J., dissenting) (Pet. App. 50a); *see also Lockyer*, 422 F.3d at 978 (Pet. App. 64a).

Unlike its two prior panel opinions (Pet. App. 58a & 114a), the en banc Ninth Circuit studiously refused to take into account employees' § 7 interests in hearing all sides of the debate when it upheld AB 1889's gags on non-coercive employer speech. The prior panel opinions properly

recognized that "the National Labor Relations Act pivots on the notion that employers and employees may freely discuss their views about union organizing efforts." *Lockyer*, 422 F.3d at 983 (Pet. App. 72a). The prior panel also recognized that:

> "The exercise of free speech in these campaigns should not be unduly restricted by narrow construction. It is highly desirable that *the employees* involved in a union campaign should hear all sides of the question in order that they may exercise the informed and reasoned choice that is their right."

Id. at 984, *quoting NLRB v. Lenkurt Elec. Co.*, 438 F.2d 1102, 1108 (9th Cir. 1971) (emphasis added) (Pet. App. 73a).[2]

This common sense desire to effectuate employee free choice, the undisputed core of the NLRA, was echoed in *Healthcare Ass'n v. Pataki* by District Court Judge McCurn, who struck down similar state gags on non-coercive employer speech.

> It is difficult, if not impossible to see, however, how an employee could intelligently exercise such [§ 7] rights, especially the right to decline union representation, if the employee only hears one side of the story–the union's. Plainly hindering an employer's ability to disseminate information opposing unionization "interferes directly" with the union organizing process which the NLRA recognizes.

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[2] As the earliest panel in this case properly held, "an overriding principle of the NLRA is that the collective bargaining process cannot function unless both employers and employees have the ability to engage in open and robust debate concerning unionization." *Chamber of Commerce of the United States v. Lockyer*, 364 F.3d 1154, 1166 (9th Cir. 2004) (Pet. App. 128a).

388 F. Supp. 2d 6, 23 (N.D.N.Y. 2005), *vacated on other grounds*, 471 F.3d 87 (2d Cir. 2006).

The Ninth Circuit's en banc ruling was particularly erroneous when it held that *Machinists*' preemption only applies "in the context of collective bargaining between organized labor and employers, not in the context of organizing, which is the subject of AB 1889." (Pet. App 13a-14a). *See Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608 (1986); *Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers v. Wis. Employment Relations Comm'n*, 427 U.S. 132 (1976). Under this fallacious rationale, a state could ban all organizing yet survive a *Machinists*' preemption challenge because it was only regulating "organizing," not collective bargaining.

Petitioners have also ably demonstrated that the Ninth Circuit's en banc ruling is erroneous and in conflict with this Court's other form of labor preemption, the *Garmon* doctrine, in which state practices even "arguably" subject to regulation under the NLRA are preempted. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959); *see also Sears Roebuck & Co. v. San Diego Dist. Council of Carpenters*, 436 U.S. 180 (1978); *Wis. Dep't of Indus., Labor & Human Relations v. Gould Inc.*, 475 U.S. 282 (1986). The en banc Ninth Circuit engaged in semantic wordplay by construing NLRA § 8(c), 29 U.S.C. § 158(c), as providing employers with no affirmative right of free speech. Such a reading baldy ignores the fact that even without § 8(c), all parties under the NLRA–unions, employers and employees–have inherent free speech rights, and that without such free speech rights the Act could not function as intended and would likely be unconstitutional under the First Amendment. *Gissel Packing Co.*, 395 U.S. at 617 ("[A]n employer's free speech right to communicate his views to his employees is firmly established

and cannot be infringed by a union or the Board. Thus, § 8(c) (29 U.S.C. § 158(c)) merely implements the First Amendment . . ." by protecting the employer's right to engage in non-coercive speech).

Therefore, the *Amici* adopt the Petitioners' well-crafted arguments concerning the preemption issues, and will not repeat them here. Instead, *Amici* will focus on the deleterious impact that statutes like AB 1889 have on employees' § 7 right to freely choose or reject labor unions. The evil of these statutes is not just that they silence one party in order to keep employees in the dark about critical unionization issues, but also that they usher in the use of other "top down" organizing tactics which further tilt the playing field in favor of union organizing. Instead of allowing free and informed employee choice to reign, AB 1889 undermines that choice by exerting pressure on employees to accept unionization. The en banc Ninth Circuit neither recognized nor protected the core policy of the NLRA–allowing employees to hear all sides of the debate about unionization and then freely to choose their desired course–so its decision must be reviewed by this Court and reversed.

II. Employee Rights Suffer When State and Local Governments Mandate "Neutrality" in Order to Tilt the Playing Field in Favor of Unionization.

As the Petitioners properly point out, a major vice of AB 1889 is not just that it enforces employer silence, but that it induces employers to capitulate to union demands for so-called "voluntary recognition agreements" or "neutrality and card check" agreements. (Pet. 27); *see also Lockyer*, 463 F.3d at 1102 (Beezer, J., dissenting) (Pet. App. 44a) (AB 1889 is "[s]imilar to neutrality agreements"). Because statutes like AB 1889 inexorably lead to union demands for broader "neutrality

and card check" agreements, the Court needs to understand how these agreements actually work and how they further diminish or destroy entirely employees' § 7 right to freely choose or reject unionization.

Armed with the powers and leverage AB 1889 provides, unions demand "neutrality and card check" agreements from employers because unions face a steady decline in the number of employees who voluntarily choose union representation when given a free choice in a secret-ballot election. Financial self-interest has driven unions to search for new ways of acquiring dues paying members.[3] The AFL-CIO's General Counsel has recommended that unions "use strategic campaigns to secure recognition . . . outside the traditional representation processes." Jonathan P. Hiatt & Lee W. Jackson, *Union Survival Strategies for the Twenty-First Century*, Lab. L.J., Summer/Fall 1996, at 176.

However, employees have fewer legal protections "outside the traditional representation processes," and thus little possibility of protecting their right under § 7 to resist union organizing campaigns targeting them. *See, e.g., Dana Corp.*, 341 N.L.R.B. 1283 (2004); NLRB General Counsel Arthur

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[3]The facts are well known: most unions are desperate for new dues paying members. In 2006, 12.0% of wage and salary workers were union members, down from 12.5% in 2005, according to the U.S. Department of Labor, Jan. 25, 2007, http://www.bls.gov/news.release/union2.nr0.htm. The number of persons belonging to a union fell by 326,000 in 2006, to a total of 15.4 million. The union membership rate has steadily declined from a high of 20.1% in 1983, the first year for which comparable union data is available. For example, in 1982, the Steelworkers union claimed 1.2 million members, but by 2002 the number was 588,000. In 1982, the United Auto Workers claimed 1.14 million members, but by 2002 only 700,000. As of today, only 7.4% of the private-sector workforce is unionized, and the other 92.6% does not appear to be flocking to join.

Rosenfeld's Report on Recent Case Developments, No. R-2544, Nov. 17, 2004, http://www.nlrb.gov/ nlrb/press/ releases/r2544.pdf. Indeed, the NLRB's most recent statistics show a steep decline in regional offices' intake of representation cases, dropping 25.6% from fiscal year 2005 to 2006, as unions retreat from the "gold standard" –the NLRB secret-ballot election–and rely overwhelmingly on "top down" organizing to secure new recruits. *Effects of NLRB's Landmark Ruling on Supervisory Status Should Become Clearer*, Daily Lab. Rep., Jan. 17, 2007, at S-9.

With the assistance of some state and local governments, unions demand "neutrality and card check" agreements not because they enhance employees' rights under § 7, but because such agreements limit those rights and hinder employees who wish to refrain from unionization. This is demonstrated by these common "neutrality" provisions:

1) Gag Rule: Although most neutrality agreements purport to require the employer to remain "neutral," in reality they impose a complete gag on all speech not favorable to the union. Even front-line supervisors are prohibited from saying anything about the union or unionization during an organizing drive. Employers must refuse to provide even truthful information in response to direct employee questions about the particular union and its motives and history. Employees are only permitted to hear one side of the story: the version the union officials want them to hear.

In contrast, employees seeking truthful information about a particular union and the effects of unionization in their workplace are entitled to truthful answers from their employer and a full debate, not rote incantations of "we do not oppose the union, and we can say nothing else by order of the State of California." Employer silence demanded by a union and

enforced by a state government does not enhance the employee's ability to make a free and informed decision under § 7. Instead, by purposefully keeping employees in the dark and silencing one side of the debate, these gag rules prevent the free flow of ideas that are critical to informed decision-making and employee free choice.

2) Special Union Access: Many "neutrality agreements" require that employers provide the union with employees' personal information, such as home addresses and phone numbers, and physical access to the employers' premises. Employees are rarely asked to consent to the release of their personal information.[4]

Armed with broad access to employees in both their homes and workplaces, unions subject employees to relentless group pressure to sign authorization cards. In one recent case, *Hotel Employees & Restaurant Employees Union, Local 57 v. Sage Hospitality Resources, LLC*, 390 F.3d 206 (3d Cir. 2004), employee Faith Jetter attested to this coercion in a sworn Declaration that was filed with the Third Circuit in support of a Motion to Intervene.

> Despite the fact that I had told the union representatives of my decision to refrain from signing the card, I felt like there was continuing pressure on me to sign. These union representatives and others were sometimes in and around the hotel, and would speak to me or approach me when I did not want to speak with them. I also heard from other employees that the union representatives were making inquiries about me, such as asking questions about my work performance. I found this to be an

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[4] *See* Glenn Taubman, *"Neutrality Agreements" and the Destruction of Employees' Section 7 Rights*, 6 Engage: Federalist Soc'y J. 101 (2005).

> invasion of my personal privacy. Once when I was on medical leave and went into the hospital, I found that when I returned to work the union representatives knew about my hospitalization and my illness. I felt like their knowledge about me and my illness was also an invasion of my personal privacy.

Sadly, these sorts of pressure tactics are the stock-in-trade of union organizers intent on procuring signatures on "authorization cards" from fearful or unsuspecting employees. In another recent NLRB case concerning the enforcement of a neutrality agreement, an employee subject to a "card check" drive by the United Auto Workers ("UAW") attested as follows:

> The UAW put constant pressure on some employees to sign cards by having union organizers bother them while on break time at work, and visit them at home. I believe that the UAW organizers also misled many employees as to the purpose and the finality of the cards. Overall, many employees signed the cards just to get the UAW organizers off their back, not because they really wanted the UAW to represent them.

Declaration of Clarice K. Atherholt in Support of Her Decertification Petition, *Dana Corp.*, 341 N.L.R.B. 1283 (2004).

Given such testimony, it is not surprising that this Court has recognized and condemned the abuses that often occur in the collection of union authorization cards. *See Linden Lumber Div., Summer & Co. v. NLRB*, 419 U.S. 301, 306 (1974). Nevertheless, the underlying purpose of state neutrality statutes like AB 1889 is to give unions leverage to demand broad access to all employees in order to perpetrate these abuses.

3) Waiver of Secret-Ballot Election: Perhaps most egregious, many "neutrality" agreements waive NLRB-supervised secret-ballot elections and substitute the "card check" process, in which a signed authorization card counts as a "vote" for the union. Thus, the union acts to prevent the employees from voting their consciences in private, even though experience shows that the process of soliciting union authorization cards often relies upon coercion and misrepresentations. *See, e.g., HCF Inc.*, 321 N.L.R.B. 1320, 1320 (1996) (pro-union militant warned an employee that if she did not sign an authorization card "the Union would come and get her children"); *Levi Strauss & Co.*, 172 N.L.R.B. 732 (1968) (misrepresentations can invalidate authorization cards).

Clearly, labor union officials and their political allies do not advocate the "card check" process because they sincerely believe that cards or petitions reflect employee sentiment more reliably than a secret-ballot election. Rather, they advocate the card check process because they know that with it they can avoid secret-ballot elections and bring to bear enormous pressure on vulnerable employees to sign the cards. Indeed, an employee's choice against signing a union card often does not end the decision-making process for that employee caught in the maw of a "card check" campaign, but instead represents only the beginning of harassment and intimidation. This Court has already recognized this danger.

> We would be closing our eyes to obvious difficulties, of course, if we did not recognize that there have been abuses, primarily arising out of misrepresentations by union organizers as to whether the effect of signing a card was to designate the union to represent the employee for collective bargaining purposes or merely to authorize it to seek an election to determine that issue.

Gissel Packing Co., 395 U.S. at 604; see also *Linden Lumber Div.*, 419 U.S. at 306 (there exists "rational, good-faith grounds for distrusting authorization cards"); *id.* at 315 n.5 (Stewart, J., dissenting) (recognizing "the possibility of undue peer pressure or even coercion in personal card solicitation"); *Brooks v. NLRB*, 348 U.S. 96, 99 (1954) ("an election is a solemn and costly occasion, conducted under safeguards to voluntary choice"). Illicit pressures are magnified when employees are subjected to a "neutrality and card check" agreement that they neither sought nor approved.

In sharp contrast to the abuses inherent in any "card check" campaign, each employee participating in a NLRB-supervised secret-ballot election makes his or her choice one time, in private. There is no one with the employee at the time of decision. The ultimate choice of the employee is secret from both the union and the employer. Once the employee has decided "yea or nay" by casting a ballot, the process is at an end. This fair process is what AB 1889 undermines.

In short, AB 1889 is designed to usher in just these sorts of abuses, under the rubric of "neutrality and card check," to radically tilt the playing field in favor of unionization and hinder employees' free choice.

III. The Proliferation of State "Neutrality" Regulations Destroys the Uniform Application of Federal Labor Policy.

This Court's review of AB 1889 must take into account the factual and legal landscape that exists in California and elsewhere in this country, in which labor unions and their political allies seek to create 50 different state labor laws in order to circumvent various federal rights, protections and strictures of which they disapprove. As one Ninth Circuit panel

recognized in an earlier opinion in this case, laws like AB 1889 are "'part of a state-by-state effort to de facto rewrite the NLRA.'" *Lockyer*, 422 F.3d at 978 n.4. (Pet. App. 64a).

This is demonstrated by the wide variety of "neutrality" regulations that are cropping up in states and municipalities across the nation. *See, e.g., Healthcare Ass'n v. Pataki*, 471 F.3d 87 (2d Cir. 2006); *Metro. Milwaukee Ass'n of Commerce v. Milwaukee County*, 431 F.3d 277 (7th Cir. 2005); *Hotel Employees & Rest. Employees Union, Local 57 v. Sage Hospitality Res., LLC*, 390 F.3d 206 (3d Cir. 2004); *Aeroground, Inc. v. City & County of San Francisco*, 170 F. Supp. 2d 950 (N.D. Cal. 2001).

Petitioners correctly point out the circuit splits and doctrinal chaos that have arisen concerning state statutes like AB 1889, which carry a veneer of "neutrality" but instead are designed to radically tilt the playing field in favor of unionization. *Compare Lockyer* (en banc) (Pet. App. 1a-57a) with *Healthcare Ass'n*, *Metro. Milwaukee Ass'n of Commerce*, and *Aeroground, Inc.*

Therefore, this Court's review is needed to ensure that state and local governments do not interfere with the uniform federal labor system crafted by Congress, and, more importantly, with employees' paramount right to choose or reject unionization in a free, informed and educated manner. To allow statutes like AB 1889 to proliferate is to permit the balkanization of federal labor policy by 50 states and hundreds of municipalities. *See Retail Indus. Leaders Ass'n v. Fielder*, ___ F.3d ___, 2007 WL 155152, at *12 (4th Cir. Jan. 17, 2007) ("This is precisely the regulatory balkanization that Congress sought to avoid . . . .").

CONCLUSION

Federal labor policy favors robust free speech and debate about unions and unionization, and abhors "gag orders" and other limits on free speech and the free exchange of ideas. The State of California has no valid interests that trump this core federal labor policy, and its parochial attempt at labor law regulation, AB 1889, must be deemed preempted. The Petition for Writ of Certiorari should be granted, and this case set for plenary consideration.

Glenn M. Taubman
c/o National Right to Work Legal
Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, VA 22160
(703) 321-8510

Counsel of Record for *Amici Curiae*

March 2007

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Supreme Court of the United States

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, *ET AL.*,

Petitioners,

v.

EDMUND G. BROWN, JR., *ET AL.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT APPENDIX

EDMUND G. BROWN, JR.
Attorney General of the State of California
ANGELA SIERRA
Supervising Deputy Attorney General
(Counsel of Record)
300 South Spring Street
Los Angeles, CA 90013
(213) 620-6312
Counsel for Respondents Edmund G. Brown, Jr., et al.

WILLIS J. GOLDSMITH
(Counsel of Record)
JONES DAY
222 East 41st Street
New York, NY 10017
(212) 326-3649
Counsel for Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

Petition for Certiorari Filed January 5, 2007
Petition for Certiorari Granted November 20, 2007

JANET GAARD
Acting Chief Assistant
Attorney General
MANUEL M. MEDEIROS
State Solicitor General
LOUIS VERDUGO, JR.
Senior Assistant Attorney
General
GORDON BURNS
Deputy Solicitor General
RICHARD T. WALDOW
Supervising Deputy
Attorney General
300 South Spring Street
Los Angeles, CA 90013
(213) 620-6312
Counsel for Respondents
Edmund G. Brown, Jr.,
et al.

STEPHEN P. BERZON
SCOTT A. KRONLAND
(*Counsel of Record*)
STACEY M. LEYTON
ALTSHULER BERZON LLP
177 Post Street, Ste. 300
San Francisco, CA 94108
(415) 421-7151
Counsel for Respondents
American Federation of
Labor and Congress of
Industrial Organizations
and California Labor
Federation

MICHAEL A. CARVIN
NOEL J. FRANCISCO
LUKE A. SOBOTA
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
(202) 879-3939
Counsel for Petitioners

ROBIN S. CONRAD
SHANE BRENNAN
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337
Of Counsel for Petitioners

STEVEN J. LAW
STEPHEN A. BOKAT
OFFICE OF CHIEF LEGAL
OFFICER AND GENERAL
COUNSEL, U.S. CHAMBER OF
COMMERCE
1615 H STREET, NW
WASHINGTON, DC 20062
(202) 463-5576
Of Counsel for Petitioners

BRADLEY W. KAMPAS
SCOTT OBORNE
JACKSON LEWIS LLP
199 Fremont Street
10th Floor
San Francisco, CA 94105
(415) 394-9400
Of Counsel for Petitioners

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General Docket
U.S. Court of Appeals for the Ninth Circuit

Court of Appeals Docket #: 03-55166

CHAMBER OF COMMERCE OF THE UNITED STATES, *et al.*
Plaintiffs– Appellees

v.

BILL LOCKYER, Attorney General, *et al.*
Defendants

1/28/03	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N): N. setting schedule as follows: Fee payment is due 2/11/03 ; appellant's designation of RT is due 1/17/03, ; appellee's designation of RT is due 1/27/03,, ; appellant shall order transcript by 2/6/03, ; court reporter shall file transcript in DC by 3/10/03; certificate of record shall be filed by 3/17/03 ; appellant's opening brief is due 4/25/03, ; appellees' brief is due 5/27/03,, ; appellants' reply brief is due 6/9/03, ; [03-55166] (pg) [03-55166]
1/28/03	Filed representation statement by Scott A. Kronland for Intervenors-Appellants served on 01/6/03 attached to NOA (CASEFILE) [03-55166] (pg) [03-55166]
1/28/03	Filed Scott A. Kronland for Appellant CA Labor Federation, Appellant AFL-CIO &

	Wholesale Civil Appeals Docketing Statement served on 1/6/03 (to CONFATT) [03-55166] [03-55166] (pg) [03-55166]
2/5/03	Received notification from District Court re payment of docket fee. (Date: pd: 2/4/03) [03-55166] (lu) [03-55166]
2/12/03	Filed Appellants in 03-55169 mtn to stay judgment of the District Court, to consolidate appeals 03-55169 and 03-55166, to exp briefing and oral argument served on 2/11/03 MOATT. [03-55169, 03-55166] (kkw) [03-55166 03-55169]
2/12/03	Case rejected from Circuit Mediation Program. (sa) [02-17161 02-17351 02-17508 02-57002 02-57052 02-57092 02-57146 02-57166 03-15032 03-15041 03-15087 03-15192 03-35023 03-55012 03-55056 03-55147 03-55166 03-55169 03-55232]
2/14/03	Filed aplts mtn for joinder to stay judgment, to consolidate appeals, & to expedite brfg & oral argument & declaration in support of; served on 2/14/03 (MOATT) [03-55166, 03-55169] (mhf) [03-55166 03-55169]
2/14/03	Received Appellant American Federation of Labor & Congress of Industrial Organizations dated 2/13/03 re: req their name be corrected. [03-55166] (mhf) [03-55166]

3/4/03	Filed Aplt's reply to aples' opposition to stay, consolidate & expedite brfg & oral argument; served on 3/4/03 (Aple's opposition not recd yet) (MOATT) [03-55166] (mhf) [03-55166]
3/13/03	Filed order (Robert R. BEEZER, M. M. McKEOWN,): (MOATT) APLTS' MTNS: to consolidate 03-55166 with 03-55169 is GRANTED, to stay dc judgment is DENIED, to expedite these appeals is GRANTED. The opn br is due 4/16/03; the answ br is due 5/16/03 & the opt rpy br is due w/in 14 days from svc of the answ brs. The clk shall place these consolidated appeals on the next available calendar aft completion of brfg. [03-55166, 03-55169] (mhf) [03-55166 03-55169]
4/8/03	Rec'd notice of correct mailing address from Suzanne M. Ambrose for Bill Lockyer, et al dated 4/7/03 (Chg to: Supervising Deputy Atty Gen, Office of the Atty Gen, 1300 "I" Street, 9th Fl, Sacramento, CA 95814, phoe 916/324-0244, fax 916/327-8192) [03-55166, 03-55169] (mhf) [03-55166 03-55169]
4/16/03	Filed original and 15 copies Aplts AFL-CIO's opening brief (Informal: NO) 48 pages and five excerpts of record in 1volumes; served on 4/15/03 [03-55166, 03-55169] (mhf) [03-55166 03-55169]
4/16/03	Received Appellant Bill Lockyer in 03-

55169's brief in 15 copies 24 pages (Informal: NO) & 5 copies of Excs in 1 vol deficient (Missing proof of svc): notified counsel. [03-55166, 03-55169] (mhf) [03-55166 03-55169]

4/24/03 Received aplt (Bill Lockyer)'s satisfaction of (major) brief deficiency, served on 4/23/03 (Proof of svc of the opn br.) [03-55166, 03-55169] (mhf) [03-55166 03-55169]

4/24/03 Filed original and 15 copies Appellant Bill Lockyer in 03-55169 opening brief (Informal: NO) 24 pages and five excerpts of record in 1volumes; served on 4/15/03 [03-55166, 03-55169] (mhf) [03-55166 03-55169]

5/9/03 Filed aplts' motion to extend time to file reply brief until 6/13/03 [03-55166, 03-55169] served on 5/9/03 [Work in progress per PROMO) [03-55166, 03-55169] (mhf) [03-55166 03-55169]

5/20/03 Filed order (Deputy Clerk: gss) (PROMO) Aplts' motion for an ext of tm to file the reply br is GRANTED. The optional reply br is due 6/13/03. If aples wish to have an ext of time to file their br, they must file a motion on their behalf. in 03-55166, 03-55169 [03-55166, 03-55169] (mhf) [03-55166 03-55169]

5/21/03 Filed AMENDED order (Deputy Clerk: gss) (PROMO) The order filed 5/20/03 is AMENDED: The answering br is due

5/23/03. The optional reply br is due 6/13/03. All parties are reminded if a party requests for an extension of time to file a br, the moving party can only request for an extension of time to file a br for their own side & must show good cause for the request for the extension. 9th C.R. 31-2.2 [03-55166, 03-55169] (mhf) [03-55166 03-55169]

5/23/03 Filed original and 15 copies appellee 's 61 pages brief, & 5 copies of Supplemental Excerpts of Record in 3 vols; served on 5/23/03 [03-55166, 03-55169] (mhf) [03-55166 03-55169]

6/3/03 Filed aples motion of take judicial notice and deputy clerk order: (Deputy Clerk: tah) Aples' request for judicial notice, any related filings, & any future such requests are referred for disposition to thepanel that considers the merits of the case. (Motion recvd 5/23/03) [03-55166, 03-55169] (mhf) [03-55166 03-55169]

6/3/03 Received amicus brief of Amicus LPA, Inc & Assoc Builders & Contractors, Inc. in support of Aples; 15 copies of 34 pages; deficient: (Need mtn to file); served on 5/30/03 Notified counsel. [03-55166, 03-55169] response to brief deficiency notice due 6/17/03 in 03-55166, in 03-55169; (mhf) [03-55166 03-55169]

6/3/03 Received amicus Associated Builders & Contractors, Inc's satisfaction of (major)

brief deficiency. (by verification of the parties consent on page 1 of the br) [03-55166, 03-55169] (mhf) [03-55166 03-55169]

6/3/03 Filed original and 15 copies of Amicus Curiae LPA, Inc & Assoc Builders & Contractors br of 34 pages in support of Aples; served on 5/30/03 [03-55166, 03-55169] (mhf) [03-55166 03-55169]

6/5/03 Filed original and 15 copies NLRB brief of 29 pages; served on 6/4/03 (NOTE: National agency- no mtn required) [03-55166, 03-55169] (mhf) [03-55166 03-55169]

6/12/03 Filed aplts' mtns to ext the time to file the reply brief until 6/20/03 & order: (Deputy Clerk: tah) (PROMO) The mtn is GRANTED. in 03-55166, 03-55169 (Motion recvd 6/6/03) [03-55166, 03-55169] (mhf) [03-55166 03-55169]

6/17/03 Calendar check performed [03-55166, 03-55169] (mw) [03-55166 03-55169]

6/20/03 Received orig. 15 copies defs/aplts Bill Lockyer et al in 03-55169, reply brief (Informal: no) of 21 pages; served on 6/19/03 deficient no cert of comp. Notified counsel. response to brief deficiency notice due 7/7/03 (dg) [03-55166 03-55169]

6/20/03 Filed aplt's motion to take judicial notice of; served on 6/19/03 [MERITS per promo] [03-55166, 03-55169] (mhf) [03-55166 03-

55169]

6/23/03 Filed aplts' motion to take judicial notice [03-55166, 03-55169] served on 6/20/03 (MERITS per 6/3/03 order) [03-55166, 03-55169] (mhf) [03-55166 03-55169]

6/23/03 Received original and 15 copies aplts' substitute brief of 37 pages; served on 6/20/03 (Deficient: oversized - recd with mtn to file oversz br) (1 copy of br with mtn to PROMO) [03-55166, 03-55169] (mhf) [03-55166 03-55169]

6/23/03 Filed Appellants' motion to file oversized brief [03-55166, 03-55169] served on 6/20/03 [Work in progress per PROMO) [03-55166, 03-55169] (mhf) [03-55166 03-55169]

6/25/03 Received dfdt aplts Bill Lockyer's satisfaction of (major) brief deficiency, served on 6/24/03 (Cert of Compliance) [03-55166, 03-55169] (mhf) [03-55166 03-55169]

6/25/03 Filed original and 15 copies aplts Bill Lockyer, et al's reply br in 03-55169 (Informal: NO) 21 pages; served on 6/19/03 [03-55166, 03-55169] (mhf) [03-55166 03-55169]

6/25/03 Filed Aplts AFL-CIO's response to aples' req for judicial notice; served on 6/20/03 (MERITS) [03-55166, 03-55169] (mhf) [03-55166 03-55169]

6/27/03 Calendar materials being prepared. [03-

55166, 03-55169] [03-55166, 03-55169] (aw) [03-55166 03-55169]

7/1/03 CALENDARED: PASA Sept 12 2003 900 am Courtroom 3 ** case to be heard 1st on cal ** [03-55166, 03-55169] (aw) [03-55166 03-55169]

7/9/03 Sent document: aplt's mtn to file oversized reply br (filed 6/23/03) w/copy of brief sent to PANEL per request of PROMO [03-55166, 03-55169] (gar) [03-55166 03-55169]

7/14/03 Filed order (Deputy Clerk: hh) Intervenors-appellants' motion for leave to file an oversized reply brief, filed 6/23/03, is GRANTED. [4775262-1] The clerk is instructed to file the reply brief, recvd 6/23/03. [03-55166, 03-55169] (hh) [03-55166 03-55169]

7/14/03 Filed original and 15 copies intvrs-aplts AFL-CIO & Wholesale and CA Labor Federation in 03-55166 reply brief, (Informal: n) 37 pages; served on 6/20/03 (to PANEL) [03-55166, 03-55169] (hh) [03-55166 03-55169]

7/28/03 Filed certificate of record on appeal RT filed in DC : 3/21/03 [03-55166] (pg) [03-55166]

8/26/03 Filed order (Deputy Clerk: hh) Plaintiffs-Aples' request for judicial notice filed 6/3/03 is GRANTED. Defendants-aplts' request for judicial notice, filed 6/20/03 is

GRANTED. Intervenors-aplts' request for judicial notice filed 6/23/03 is GRANTED. [03-55166, 03-55169] (mhf) [03-55166 03-55169]

9/12/03 ARGUED AND SUBMITTED TO Robert R. BEEZER, Raymond C. FISHER, Morrison C. England [03-55166, 03-55169] (rmw) [03-55166 03-55169]

4/20/04 FILED OPINION: AFFIRMED. Each party shall bear its own costs on appeal. (Terminated on the Merits after Oral Hearing; Affirmed; Written, Signed, Published. Robert R. BEEZER; Raymond C. FISHER, author; Morrison C. England.) FILED AND ENTERED JUDGMENT. [03-55166, 03-55169] (mhf) [03-55166 03-55169]

4/23/04 Filed itv Appellants (AFL-CIO) motion for a 14-day ext of tm to file the pet for rhrg & rhrg en banc; served on 4/23/04 [PANEL] [03-55166, 03-55169] (mhf) [03-55166 03-55169]

4/29/04 Filed order (Raymond C. FISHER,): granting intv appellant's mtn for ext of tm to file a pet for rhrg & rhrg enbanc. The pet shall be filed on or bef 5/18/04. (PHONED csl & Faxed to PANEL: 3:42) [03-55166, 03-55169] (mhf) [03-55166 03-55169]

4/29/04 Filed Appellant Bill Lockyer motion to extend time to file petition for rehearing until 5/18/04 [03-55166, 03-55169] served

on 4/28/04 [Faxed to PANEL] [03-55166, 03-55169] (mhf) [03-55166 03-55169]

5/3/04 Filed Aplts (Dept of Health Svcs, Vanacore & Bonta)'s mtn for ext of tm until 5/18/04 to file pet for rhrg & rhrg en banc; served on 4/30/04 (Faxed to PANEL) [03-55166, 03-55169] (mhf) [03-55166 03-55169]

5/6/04 Filed order (Raymond C. FISHER,): granting aplt Dept of Health Services, Vanacore & Bonta's mtn for ext of tm to file the pet for rhrg & suggestion for rhrg enbanc. The pet is due 5/18/04. (PHONED/Faxed to csl/PANEL: 3:26) in 03-55166, 03-55169 [03-55166, 03-55169] (mhf) [03-55166 03-55169]

5/6/04 Filed order (Raymond C. FISHER,): granting appellant's Cal Atty Gen Bill Lockyer's mtn for an ext of tm to file the pet for rhg & suggestion for rhrg enbanc. The pet is due 5/18/04. (Phoned/Faxed csl/Panel: 3:26) in 03-55166, 03-55169 [03-55166, 03-55169] (mhf) [03-55166 03-55169]

5/18/04 Filed original and 50 copies Appellant Bill Lockyer in 03-55169 petition for panel rehearing and petition for rehearing en banc 9 p.pages, served on 5/17/04 (PANEL & ALL ACTIVE JUDGES) [03-55166, 03-55169] (mhf) [03-55166 03-55169]

5/18/04 Filed original and 50 copies Aplts Itvs AFL-CIO & Wholesale, CA Labor

	Federation in 03-55166 petition for panel rehearing and petition for rehearing en banc 18 p.pages, served on 5/18/04 (PANEL & ALL ACTIVE JUDGES) [03-55166, 03-55169] (mhf) [03-55166 03-55169]
6/9/04	Filed order (Robert R. BEEZER, Raymond C. FISHER, Morrison C. England,): Within 21 days from the date of this order, plfts aples are directed to file a resp to the separate pets for rhrg en banc filed on 5/18/04. Fifty copies of the resp shall be filed w/the clk of crt in SF, CA & shall not exceed 15 pgs. [03-55166, 03-55169] (mhf) [03-55166 03-55169]
6/30/04	Received Appellee Chamber of Commerce et al's oversized response to petition for rhearing and rehearing en banc [5065755-1] [5066430-1] served on 6/30/04 [03-55166, 03-55169] PANEL AND ALL ACTIVE JUDGES (gar) [03-55166 03-55169]
7/9/04	Received Intervenors AFL-CIO & California Labor Federation AFL-CIO's reply in support of petition for rehearing and rehearing en banc of 5 pages; served on 7/9/04 (PANEL ONLY) [03-55166, 03-55169] (gva) [03-55166 03-55169]
7/9/04	Filed Intervenor/Aplts AFL-CIO and CA Labor Federation AFL-CIO's motion for leave to file reply in support of petition for rehearing and rehearing en banc; served

	on 7/9/04 (PANEL) [03-55166, 03-55169] (gva) [03-55166 03-55169]
10/12/04	Filed aplt American Federation in 03-55166 additional citations, served on 10/12/04 (PANEL & ALL ACTIVE JUDGES) [03-55166, 03-55169] (mhf) [03-55166 03-55169]
10/22/04	Filed aples' Chamber of Commerce's mtn to strike intervenors' suppl authority; served on 10/22/04 (Copies to PANEL only) (mhf) [03-55166 03-55169]
3/7/05	Received Appellants AFL-CIO's letter dated 3/4/05 re: the status of their mtn for leave to file their reply br in support of the pete for rhrg; (PANEL) [03-55166, 03-55169] (mhf) [03-55166 03-55169]
5/13/05	Filed order FOR PUBLICATION (Robert R. BEEZER, Raymond C. FISHER, Morrison C. England,): The petition for panel rehearing is granted, and the case shall be resubmitted as of the date of this order, without additional oral argument. The panel's opinion is withdrawn and shall not be cited as precedent by or to this court or any district court of the Ninth Circuit, except to the extent adopted by the panel upon rehearing. (redktd to correct entry) [03-55166, 03-55169] (eu) [03-55166 03-55169]
5/13/05	Case resubmitted on this date to Robert R. BEEZER, Raymond C. FISHER, Morrison C. England. (See 5/13/05 order)

submission.) Order filed: 5/13/05. [03-55166, 03-55169] (eu) [03-55166 03-55169]

5/26/05 Filed Chamber of Commerce et al's additional citations, served on 5/26/05 PANEL [03-55166, 03-55169] (gar) [03-55166 03-55169]

9/6/05 FILED OPINION: AFFIRMED (Terminated on the Merits after Oral Hearing; Affirmed; Written, Signed, Published. Robert R. BEEZER, author; Raymond C. FISHER, dissenting; Morrison C England.) FILED AND ENTERED JUDGMENT. [03-55166, 03-55169] (mhf) [03-55166 03-55169]

9/13/05 Filed order (Robert R. BEEZER,): Each of the parties to this appl is requested to file a br addressing the question of whether this appl should be heard en banc. The br requested shall not exceed 15 pages and may be prepared in letter form. The br requested shall be filed with the clerk of the ct within 21 days from the date of this order. Such filings shall include 50 copies, together with a signed original of the requested br. Amicus br are not invited at this time. [03-55166] (gar) [03-55166]

9/13/05 Filed Appellant CA Labor Federation, Appellant American Federation's motion to extend time to file petition for rehearing until 10/20/05 [03-55166, 03-55169] served on 9/13/05 [5560991]

PANEL [03-55166, 03-55169] (gar) [03-55166 03-55169]

9/16/05 Filed order (Robert R. BEEZER,): A mtn for ext of time to file a pet for rhg en banc was filed 9/13/05. By reason of a sua sponte call for rhrg en banc made by one of the judges of this ct, the mtn for ext of time is moot. This order with w/o prejudice to any further filings by the parties in response to the pending call for reconsideration en banc or for ext of time to make filings beyond the time prescribed by rule. PHONED [5560991-1] [03-55166] (gar) [03-55166]

9/23/05 Filed Appellants CA Labor Federation & AFL's unopposed mtn for ext of tm to file brs regarding whether appeal should be reheard en banc & Declaration in support of; served on 9/23/05 [Faxed to PANEL] [03-55166, 03-55169] (mhf) [03-55166 03-55169]

9/29/05 Filed Appellants Bill Lockyer in 03-55169's joinder to mtn for ext of tm to file brs regarding whether appeal should reheard & declaration in support of; served on 9/28/05 [PANEL] [03-55166, 03-55169] (mhf) [03-55166 03-55169]

10/5/05 Filed order (Robert R. BEEZER, Raymond C. FISHER, Morrison C. England,): Aplts' mtn for ext of tm to file Briefs Regarding Whether Appeal Should Be Reheard En Banc filed on 9/23/05 is

GRANTED (Phoned/Faxed: 12:29) in 03-55166, 03-55169 [03-55166, 03-55169] (mhf) [03-55166 03-55169]

10/12/05 Received Appellant American Federation of Labor & Congress's letter dated 10/10/05 re: sveral clerical errors in the caption on the Opinion filed 9/16/05 (PANEL by FED X) [03-55166, 03-55169] (mhf) [03-55166 03-55169]

10/25/05 Filed Intervenors Appellants (AFL-CIO & CA Labor Fed)'s response to crt order of 9/13/05 re Whether this case should be reheard en banc; served on 10/25/05 (PANEL & ALL ACTIVE JUDGES ANY INTERESTED SENIOR JUDGE) [03-55166, 03-55169] (mhf) [03-55166 03-55169]

10/25/05 Filed Appellees (Chamber of Commerce, et al)'s response to crt order of 9/13/05 re Whether the case should be reheard en banc; served on 10/25/05 (PANEL & ALL ACTIVE JUDGES & ANY INTERESTED SENIOR JUDGE) [03-55166, 03-55169] (mhf) [03-55166 03-55169]

10/26/05 Filed Appellants Bill Lockyer, et al's in response to crt's 9/13/05 as to Whether the appeal should be reheard en banc; served on 10/25/05 (PANEL & ALL ACTIVE JUDGES & ANY INTERESTED SENIOR JUDGE) [03-55166, 03-55169] (mhf) [03-55166 03-55169]

11/2/05 Filed aples' mtn to strike intervenors'

aplts' br in support of en banc review; served on 11/2/05 [PANEL only) (mhf) [03-55166 03-55169]

12/15/05 Filed AFL-CIO, CLF additional citations, FRAP 28(j) letter, served on 12/15/05 (PANEL & ALL ACTIVE & INTERESTED SENIOR JUDGES) [03-55166, 03-55169] (ru) [03-55166 03-55169]

1/17/06 Filed order (Mary M. SCHROEDER,): Upon the vote of a majority of nonrecused regular active judges of this crt, it is ordered that this case be reheard by the en banc court pursuant to Circ Rule 35-3. The three-judge panel opinion shall not be cited as precedent by or to this crt or any dc of the 9th Cir, except to the extent adopted by the en banc court. [03-55166, 03-55169] (mhf) [03-55166 03-55169]

1/20/06 Filed order (Mary M. SCHROEDER) The parties shall forward to the clerk of court thirty (30) copies of their original briefs and excerpts of record within 7 days from the date of this order. (phoned/faxed) [03-55166, 03-55169] (gva) [03-55166 03-55169]

1/25/06 Filed order (Mary M. SCHROEDER,): Oral argument shall be reheard en banc in S.F., CA on Tuesday, 3/21/06 at 2:30 p.m. (PHONED/Faxed: 3:08) [03-55166, 03-55169] (mhf) [03-55166 03-55169]

1/25/06 Filed aples' (FAXED) req for ext of time (1 day) to provide copies of brs & excs of rec

	to enbanc court; [03-55166, 03-55169] served on 1/25/06 [SCHROEDER) (mhf) [03-55166 03-55169]
1/25/06	CALENDARED: SAN FRAN Mar 21 2006 230 pm Courtroom 1 [03-55166, 03-55169] (aw) [03-55166 03-55169]
1/26/06	Recd Aplt Bill Lockyer's opn brs, Jt excs in 2 vols & rpy brs (EN BANC PANEL) [03-55166, 03-55169] (mhf) [03-55166 03-55169]
1/26/06	Recd aplts' req for judicial notice originally filed on 6/20/06 (EN BANC PANEL) [03-55166, 03-55169] (mhf) [03-55166 03-55169]
1/26/06	Received from intervenor appellants AFL-CIO, California Labor Federation: 30 copies of (1) intervenor-appellant's brief filed 4/16/03; (2) reply brief filed 7/14/03; (3) response to appellees' request for judicial notice filed 6/25/03; (4) intervenor appellant's request for judicial notice filed 6/23/03. (to En Banc Court) [03-55166, 03-55169] (ru) [03-55166 03-55169]
1/26/06	Filed notice of appearance of Angela Siera (Withdrew as counsel: [03-55166, 03-55169] (mhf) [03-55166 03-55169]
1/31/06	Recd aple Chamber of Commerce's Answering br & suppl exc in 3 vols (EN BANC PANEL) [03-55166, 03-55169] (mhf) [03-55166 03-55169]
2/2/06	Recd addl copies of Aples' Additional Cites

previously filed on 5/26/06 (EN BANC PANEL) [03-55166, 03-55169] (mhf) [03-55166 03-55169]

2/2/06 Recd addl copies of aples' Req for judicial notice previously recd on 5/23/03 (EN BANC PANEL) [03-55166, 03-55169] (mhf) [03-55166 03-55169]

2/3/06 Received from amicus parties 30 copies of (1) brief of amici curiae LPA, Inc. and Associated Builders filed on 5/3/03 and (2) brief of amicus curiae National Labor Relations Board (NLRB) filed on 6/5/03. (to En Banc Court) [03-55166, 03-55169] (ru) [03-55166 03-55169]

2/6/06 Filed order (Mary M. SCHRODER): Aple Chamber of Commerce's mtn for ext of tm is GRANTED. The Chamber of Commerce's br & excs are ordered filed. in 03-55166, 03-55169 [03-55166, 03-55169] (mhf) [03-55166 03-55169]

2/6/06 Filed Aples Chamber of Commerce, et al's motion to reschedule enbanc oral argument to either 3/22, 23 or 24, 2006; served on 2/6/06 (FAXED to EN BANC PANEL) [5714438] (mhf) [03-55166 03-55169]

2/9/06 Filed order (Mary M. SCHROEDER,): Aple's unopposed mtn to reschedule en banc argument is DENIED because of previous scheduling commitments of the crt. in 03-55166, 03-55169 [03-55166, 03-55169] (mhf) [03-55166 03-55169]

2/9/06	Filed order (Mary M. SCHROEDER,): Upon the vote of a majority of the en banc court, the opinion & dissent filed on 9/6/05, slip op 12167, & appearing at 422 F.3d 973 (9th Cir. 2005), are withdrawn. [03-55166, 03-55169] (mhf) [03-55166 03-55169]
2/23/06	Filed mtn & Declaration by Amicus South Coast Air Quality Management Dist for exemption from Circ Rule 46-5; [03-55166, 03-55169] served on 2/23/06 [5737417] (mhf) [03-55166 03-55169]
2/28/06	Filed Amicus South Coast Air Quality Management District motion to become amicus curiae [03-55166, 03-55169] served on 2/28/06 [EN BANC PANEL) (mhf) [03-55166 03-55169]
2/28/06	Received Amicus South Coast Air Quality Management District's brief in 50 copies of 16 pages; served on 2/28/06; deficient: (Mtn to file pending) (EN BANC PANEL) [03-55166, 03-55169] (mhf) [03-55166 03-55169]
3/6/06	Filed order (Mary M. SCHROEDER,): Amicus South Coast Air Quality Management District csl Winter King's mtn for exemption from Circuit Rule 46-5 is GRANTED. in 03-55166, 03-55169 [03-55166, 03-55169] (mhf) [03-55166 03-55169]
3/9/06	Filed order (Mary M. SCHROEDER,): South Cost Air Quality Management

	District's mtn for leave to file br of amicus curiae is GRANTED. (PHONED/FAXED: 9:46) in 03-55166, 03-55169 [03-55166, 03-55169] (mhf) [03-55166 03-55169]
3/9/06	Filed original and 50 copies South Coast Air Quality's amicus curiae br of 16 pages ;served on 2/28/06 [03-55166, 03-55169] (mhf) [03-55166 03-55169]
3/21/06	Filed Los Angeles Taxi Ind's mtn for lv to file amicus br in support of neither party ; served on 3/20/06 [EN BANC PANEL) [03-55166, 03-55169] (mhf) [03-55166 03-55169]
3/21/06	Received Amicus Los Angeles Taxi Industry in support of neither party's brief in 50 copies of 19 pages; served on 3/20/06; deficient: (mtn to file pending)(Copies to EN BANC PANEL w/mtn) Notified counsel. [03-55166, 03-55169] (mhf) [03-55166 03-55169]
3/21/06	ARGUED AND SUBMITTED TO Mary M. SCHROEDER, Stephen R. REINHARDT, Robert R. BEEZER, Alex KOZINSKI, Andrew J. KLEINFELD, Michael D. HAWKINS, Sidney R. THOMAS, Barry G. SILVERMAN, M. M. McKEOWN, Kim M. WARDLAW, Raymond C. FISHER, Richard A. PAEZ, Johnnie B. RAWLINSON, Richard R. CLIFTON, CONSUELO M. CALLAHAN [03-55166, 03-55169] (ca) [03-55166 03-55169]

4/26/06	Filed aples Chamber of Commerce, et al's additional citations, served on 4/26/06 (EN BANC PANEL by FED X) [03-55166, 03-55169] (mhf) [03-55166 03-55169]
4/26/06	Filed aples Chamber of Commerce's mtn to take judicial notice; served on 4/26/06 [EN BANC PANEL by FED X) (mhf) [03-55166 03-55169]
5/1/06	Filed Intervenor Aplts (CA Labor Federation & American Federation)'s response to notice of supplemental authority & opposition to req for judicial notice; served on 5/1/06 (EN BANC PANEL by FED X) [03-55166, 03-55169] (mhf) [03-55166 03-55169]
5/16/06	Filed order (Mary M. SCHROEDER,): denying appellee's request for judicial notice. in 03-55166, 03-55169 [03-55166, 03-55169] (mhf) [03-55166 03-55169]
9/21/06	FILED OPINION: REVERSED and its injunction is VACATED. We remand for further proceedings consistent with this opinion (Terminated on the Merits after Oral Hearing; Reversed; Written, Signed, Published. Heard en banc; Mary M. SCHROEDER; Stephen R. REINHARDT; Robert R. BEEZER, dissenting; Alex KOZINSKI; Andrew J. KLEINFELD; Michael D. HAWKINS; Sidney R. THOMAS; Barry G. SILVERMAN; M. M. McKEOWN; Kim M. WARDLAW; Raymond C. FISHER, author; Richard A.

PAEZ; Johnnie B. RAWLINSON; Richard R. CLIFTON; CONSUELO M. CALLAHAN.) FILED AND ENTERED JUDGMENT. [03-55166, 03-55169] (mhf) [03-55166 03-55169]

10/5/06 Filed Aples' motion to stay the mandate; served on 10/5/06 (PANEL) (gva) [03-55166 03-55169]

10/5/06 Filed Aples' motion to stay issuance of mandate; served on 10/5/06 (MMS) 5970201] (gva) [03-55166 03-55169]

11/20/06 Filed order (Mary M. SCHROEDER, Stephen R. REINHARDT, Robert R. BEEZER, Alex KOZINSKI, Andrew J. KLEINFELD, Michael D. HAWKINS, Sidney R. THOMAS, Barry G. SILVERMAN, M. M. McKEOWN, Kim M. WARDLAW, Raymond C. FISHER, Richard A. PAEZ, Johnnie B. RAWLINSON, Richard R. CLIFTON, CONSUELO M. CALLAHAN,): Aples' mtn to stay the mandate filed 10/6/06 is GRANTED. The mandate is stayed pending the filing of a pet for writ of certiorari in the Supreme Court. The stay expires 90 days from the date of this order unless aples file a pet for the writ & so notify the clerk of court in writing within the period of the stay. In that case, the stay shall continue until final disposition by the Supreme Court. (PHONED/FAXED: 12:01) in 03-55169, 03-55166 [03-55166, 03-55169] (mhf) [03-

55166 03-55169]

12/18/06 Received letter from the Supreme Court dated 12/12/06 re: application for an ext of tm to file a pet for a writ of certiorari has been extended to & including 1/5/07 [03-55166, 03-55169] (mhf) [03-55166 03-55169]

1/8/07 Rec'd notice of FIRM NAME CHANGE from Scott A. Kronland for Appellants dated 1/5/07. Chg to: ALTSHULER BERZON LLP. The firm's address & telephone & fax numbers remain the same. [03-55166, 03-55169] (mhf) [03-55166 03-55169]

1/12/07 Received notice from Supreme Court: petition for certiorari filed Supreme Court No. 06-939 filed on 1/5/07. [03-55166, 03-55169] (mhf) [03-55166 03-55169]

2/16/07 Filed aples' motion for further stay until disposition of their pet for writ of certiorari with the Supreme Court; served on 2/16/07 (MMS) (mhf) [03-55166 03-55169]

11/26/07 Received notice from Supreme Court, petition for certiorari GRANTED on 11/20/07 . Supreme Court No. 06-939 PANEL (gar) [03-55166 03-55169]

General Docket
US Court of Appeals for the Ninth Circuit

Court of Appeals Docket #: 03-55169

CHAMBER OF COMMERCE OF THE UNITED STATES, *et al.*, Plaintiffs-Appellees,

v.

BILL LOCKYER, Attorney General, *et al.*, Defendants

1/29/03	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N): N. setting schedule as follows: appellant's designation of RT is due 1/23/03,, ; appellee's designation of RT is due 2/3/03,, ; appellant shall order transcript by 2/12/03,, ; court reporter shall file transcript in DC by 3/17/03; certificate of record shall be filed by 3/24/03 ; appellant's opening brief is due 5/1/03,, ; appellees' brief is due 6/2/03; appellants' reply brief is due 6/16/03 ; [03-55169] (pg) [03-55169]
1/29/03	Filed representation statement by Suzanne M. Ambrose for Defendants-Appellants served on 01/26/03 (CASEFILE) [03-55169] (pg) [03-55169]
1/29/03	Filed Suzanne M. Ambrose for Appellant Bill Lockyer in 03-55169 Civil Appeals Docketing Statement served on 1/9/03 (to

CONFATT) [03-55169] [03-55169] (pg) [03-55169]

2/12/03 Filed Appellants in 03-55169 mtn to stay judgment of the District Court, to consolidate appeals 03-55169 and 03-55166, to exp briefing and oral argument served on 2/11/03 MOATT. [03-55169, 03-55166] (kkw) [03-55166 03-55169]

2/12/03 Case rejected from Circuit Mediation Program. (sa) [02-17161 02-17351 02-17508 02-57002 02-57052 02-57092 02-57146 02-57166 03-15032 03-15041 03-15087 03-15192 03-35023 03-55012 03-55056 03-55147 03-55166 03-55169 03-55232]

2/14/03 Filed aplts mtn for joinder to stay judgment, to consolidate appeals, & to expedite brfg & oral argument & declaration in support of; served on 2/14/03 (MOATT) [03-55166, 03-55169] (mhf) [03-55166 03-55169]

2/24/03 Filed Appellees' opposition to Aplts' mtn to stay judgment of the District Court, to consolidate appeals and to expedite briefing and oral argument schedule served on 2/24/03 MOATT. [03-55169] (kkw) [03-55169]

2/28/03 Filed Appellees Corporate Disclosure Statement. Served on 2/28/03 CASEFILE. [03-55169] (kkw) [03-55169]

3/4/03 Filed State Aplts' reply to Aples' opposition to mtn to stay, consolidate appeals and to expedite appeal; served on 3/3/03 MOATT. [03-55169] (kkw) [03-55169]

3/13/03 Filed order (Robert R. BEEZER, M. M. McKEOWN,): (MOATT) APLTS' MTNS: to consolidate 03-55166 with 03-55169 is GRANTED, to stay dc judgment is DENIED, to expedite these appeals is GRANTED. The opn br is due 4/16/03; the answ br is due 5/16/03 & the opt rpy br is due w/in 14 days from svc of the answ brs. The clk shall place these consolidated appeals on the next available calendar aft completion of brfg. [03-55166, 03-55169] (mhf)

[03-55166 03-55169]

4/8/03 Rec'd notice of correct mailing address from Suzanne M. Ambrose for Bill Lockyer, et al dated 4/7/03 (Chg to: Supervising Deputy Atty Gen, Office of the Atty Gen, 1300 "I" Street, 9th Fl, Sacramento, CA 95814, phone 916/324-0244, fax 916/327-8192) [03-55166, 03-55169] (mhf) [03-55166 03-55169]

4/16/03 Filed original and 15 copies Aplts AFL-CIO's opening brief (Informal: NO) 48 pages and five excerpts of record in 1volumes; served on 4/15/03 [03-55166,

03-55169] (mhf) [03-55166 03-55169]

4/16/03 Received Appellant Bill Lockyer in 03-55169's brief in 15 copies 24 pages (Informal: NO) & 5 copies of Excs in 1 vol deficient (Missing proof of svc): notified counsel. [03-55166, 03-55169] (mhf) [03-55166 03-55169]

4/24/03 Received aplt (Bill Lockyer)'s satisfaction of (major) brief deficiency, served on 4/23/03 (Proof of svc of the opn br.) [03-55166, 03-55169] (mhf) [03-55166 03-55169]

4/24/03 Filed original and 15 copies Appellant Bill Lockyer in 03-55169 opening brief (Informal: NO) 24 pages and five excerpts of record in 1volumes; served on 4/15/03 [03-55166, 03-55169] (mhf) [03-55166 03-55169]

5/9/03 Filed aples American Federation, et al's motion to extend time to file appellee's brief until 5/23/03; served on 5/9/03 (Work in progress per PROMO) (mhf) [03-55169]

5/9/03 Filed aplts' motion to extend time to file reply brief until 6/13/03 [03-55166, 03-55169] served on 5/9/03 [Work in progress per PROMO) [03-55166, 03-55169] (mhf) [03-55166 03-55169]

5/20/03 Filed order (Deputy Clerk: gss) (PROMO) Aplts' motion for an ext of tm to file the

reply br is GRANTED. The optional reply br is due 6/13/03. If aples wish to have an ext of time to file their br, they must file a motion on their behalf. in 03-55166, 03-55169 [03-55166, 03-55169] (mhf) [03-55166 03-55169]

5/21/03 Filed AMENDED order (Deputy Clerk: gss) (PROMO) The order filed 5/20/03 is AMENDED: The answering br is due 5/23/03. The optional reply br is due 6/13/03. All parties are reminded if a party requests for an extension of time to file a br, the moving party can only request for an extension of time to file a br for their own side & must show good cause for the request for the extension. 9th C.R. 31-2.2 [03-55166, 03-55169] (mhf) [03-55166 03-55169]

5/23/03 Filed original and 15 copies appellee 's 61 pages brief, & 5 copies of Supplemental Excerpts of Record in 3 vols; served on 5/23/03 [03-55166, 03-55169] (mhf) [03-55166 03-55169]

6/3/03 Filed aples motion of take judicial notice and deputy clerk order: (Deputy Clerk: tah) Aples' request for judicial notice, any related filings, & any future such requests are referred for disposition to the panel that considers the merits of the case. (Motion rcvd 5/23/03) [03-55166, 03-55169] (mhf) [03-55166 03-55169]

6/3/03 Received amicus brief of Amicus LPA, Inc & Assoc Builders & Contractors, Inc. in support of Aples; 15 copies of 34 pages; deficient: (Need mtn to file); served on 5/30/03 Notified counsel. [03-55166, 03-55169] response to brief deficiency notice due 6/17/03 in 03-55166, in 03-55169; (mhf) [03-55166 03-55169]

6/3/03 Received amicus Associated Builders & Contractors, Inc's satisfaction of (major) brief deficiency. (by verification of the parties consent on page 1 of the br) [03-55166, 03-55169] (mhf) [03-55166 03-55169]

6/3/03 Filed original and 15 copies of Amicus Curiae LPA, Inc & Assoc Builders & Contractors br of 34 pages in support of Aples; served on 5/30/03 [03-55166, 03-55169] (mhf) [03-55166 03-55169]

6/5/03 Received Amicus National Labor Board's brief in support of aples; original & 15 copies of 29 pages; deficient: (Need mtn); served on 6/4/03 Notified counsel. [03-55166, 03-55169] (mhf) [03-55169]

6/5/03 Filed original and 15 copies NLRB brief of 29 pages; served on 6/4/03 (NOTE: National agency- no mtn required) [03-55166, 03-55169] (mhf) [03-55166 03-55169]

6/12/03 Filed aplts' mtns to ext the time to file the

reply brief until 6/20/03 & order: (Deputy Clerk: tah) (PROMO) The mtn is GRANTED in 03-55166, 03-55169 (Motion recvd 6/6/03) [03-55166, 03-55169] (mhf) [03-55166 03-55169]

6/17/03 Calendar check performed [03-55166, 03-55169] (mw) [03-55166 03-55169]

6/20/03 Received orig. 15 copies defs/aplts Bill Lockyer et al in 03-55169, reply brief (Informal: no) of 21 pages; served on 6/19/03 deficient no cert of comp. Notified counsel. response to brief deficiency notice due 7/7/03 (dg) [03-55166 03-55169]

6/20/03 Filed aplt's motion to take judicial notice of; served on 6/19/03 [MERITS per promo] [03-55166, 03-55169] (mhf) [03-55166 03-55169]

6/23/03 Filed original and 15 copies aplts' Corrected reply br of 37 pages ; served on 6/20/03 [03-55166, 03-55169] (mhf) [03-55169]

6/23/03 Filed aplts' motion to take judicial notice [03-55166, 03-55169] served on 6/20/03 (MERITS per 6/3/03 order) [03-55166, 03-55169] (mhf) [03-55166 03-55169]

6/23/03 Received original and 15 copies aplts' substitute brief of 37 pages; served on 6/20/03 (Deficient: oversized - recd with mtn to file oversz br) (1 copy of br with mtn to PROMO) [03-55166, 03-55169]

(mhf) [03-55166 03-55169]

6/23/03 Filed Appellants' motion to file oversized brief [03-55166, 03-55169] served on 6/20/03 [Work in progress per PROMO) [03-55166, 03-55169] (mhf) [03-55166 03-55169]

6/25/03 Received dfdt aplts Bill Lockyer's satisfaction of (major) brief deficiency, served on 6/24/03 (Cert of Compliance) [03-55166, 03-55169] (mhf) [03-55166 03-55169]

6/25/03 Filed original and 15 copies aplts reply brief, (Informal: NO) 37 pages; served on 6/20/03 [03-55166, 03-55169] (mhf) [03-55169]

6/25/03 Filed original and 15 copies aplts Bill Lockyer, et al's reply br in 03-55169 (Informal: NO) 21 pages; served on 6/19/03 [03-55166, 03-55169] (mhf) [03-55166 03-55169]

6/25/03 Filed Aplts AFL-CIO's response to aples' req for judicial notice; served on 6/20/03 (MERITS) [03-55166, 03-55169] (mhf) [03-55166 03-55169]

6/27/03 Calendar materials being prepared. [03-55166, 03-55169] [03-55166, 03-55169] (aw) [03-55166 03-55169]

7/1/03 CALENDARED: PASA Sept 12 2003 900

am Courtroom 3 ** case to be heard 1st on cal ** [03-55166, 03-55169] (aw) [03-55166 03-55169]

7/9/03 Sent document: aplt's mtn to file oversized reply br (filed 6/23/03) w/copy of brief sent to PANEL per request of PROMO [03-55166, 03-55169] (gar) [03-55166 03-55169]

7/14/03 Filed order (Deputy Clerk: hh) Intervenors-appellants' motion for leave to file an oversized reply brief, filed 6/23/03, is GRANTED. [4775262-1] The clerk is instructed to file the reply brief, recvd 6/23/03. [03-55166, 03-55169] (hh) [03-55166 03-55169]

7/14/03 Filed original and 15 copies intvrs-aplts AFL-CIO & Wholesale and CA Labor Federation in 03-55166 reply brief, (Informal: n) 37 pages; served on 6/20/03 (to PANEL) [03-55166, 03-55169] (hh) [03-55166 03-55169]

7/28/03 Filed certificate of record on appeal RT filed in DC : 3/21/03 [03-55169] (pg) [03-55169]

8/26/03 Filed order (Deputy Clerk: hh) Plaintiffs-Aples' request for judicial notice filed 6/3/03 is GRANTED. Defendants-aplts' request for judicial notice, filed 6/20/03 is GRANTED. Intervenors-aplts' request for judicial notice filed 6/23/03 is GRANTED.

[03-55166, 03-55169] (mhf) [03-55166 03-55169]

9/12/03 ARGUED AND SUBMITTED TO Robert R. BEEZER, Raymond C. FISHER, Morrison C. England [03-55166, 03-55169] (rmw) [03-55166 03-55169]

4/20/04 FILED OPINION: AFFIRMED. Each party shall bear its own costs on appeal. (Terminated on the Merits after Oral Hearing; Affirmed; Written, Signed, Published. Robert R. BEEZER; Raymond C. FISHER, author; Morrison C. England.) FILED AND ENTERED JUDGMENT. [03-55166, 03-55169] (mhf) [03-55166 03-55169]

4/23/04 Filed itv Appellants (AFL-CIO) motion for a 14-day ext of tm to file the pet for rhrg & rhrg en banc; served on 4/23/04 [PANEL] [03-55166, 03-55169] (mhf) [03-55166 03-55169]

4/29/04 Filed order (Raymond C. FISHER,): granting intv appellant's mtn for ext of tm to file a pet for rhrg & rhrg enbanc. The pet shall be filed on or bef 5/18/04. (PHONED csl & Faxed to PANEL: 3:42) [03-55166, 03-55169] (mhf) [03-55166 03-55169]

4/29/04 Filed Appellant Bill Lockyer motion to extend time to file petition for rehearing until 5/18/04 [03-55166, 03-55169] served

on 4/28/04 [Faxed to PANEL] [03-55166, 03-55169] (mhf) [03-55166 03-55169]

5/3/04 Filed Aplts (Dept of Health Svcs, Vanacore & Bonta)'s mtn for ext of tm until 5/18/04 to file pet for rhrg & rhrg en banc; served on 4/30/04 (Faxed to PANEL) [03-55166, 03-55169] (mhf) [03-55166 03-55169]

5/6/04 Filed order (Raymond C. FISHER,): granting aplt Dept of Health Services, Vanacore & Bonta's mtn for ext of tm to file the pet for rhrg & suggestion for rhrg enbanc. The pet is due 5/18/04. (PHONED/Faxed to csl/PANEL: 3:26) in 03-55166, 03-55169 [03-55166, 03-55169] (mhf) [03-55166 03-55169]

5/6/04 Filed order (Raymond C. FISHER,): granting appellant's Cal Atty Gen Bill Lockyer's mtn for an ext of tm to file the pet for rhg & suggestion for rhrg enbanc. The pet is due 5/18/04. (Phoned/Faxed csl/Panel: 3:26) in 03-55166, 03-55169 [03-55166, 03-55169] (mhf) [03-55166 03-55169]

5/18/04 Filed original and 50 copies Appellant Bill Lockyer in 03-55169 petition for panel rehearing and petition for rehearing en banc 9 p.pages, served on 5/17/04 (PANEL & ALL ACTIVE JUDGES) [03-55166, 03-55169] (mhf) [03-55166 03-55169]

5/18/04	Filed original and 50 copies Aplts Itvs AFL-CIO & Wholesale, CA Labor Federation in 03-55166 petition for panel rehearing and petition for rehearing en banc 18 p.pages, served on 5/18/04 (PANEL & ALL ACTIVE JUDGES) [03-55166, 03-55169] (mhf) [03-55166 03-55169]
6/9/04	Filed order (Robert R. BEEZER, Raymond C. FISHER, Morrison C. England,): Within 21 days from the date of this order, plfts aples are directed to file a resp to the separate pets for rhrg en banc filed on 5/18/04. Fifty copies of the resp shall be filed w/the clk of crt in SF, CA & shall not exceed 15 pgs. [03-55166, 03-55169] (mhf) [03-55166 03-55169]
6/30/04	Received Appellee Chamber of Commerce et al's oversized response to petition for rhearing and rehearing en banc [5065755-1] [5066430-1] served on 6/30/04 [03-55166, 03-55169] PANEL AND ALL ACTIVE JUDGES (gar) [03-55166 03-55169]
7/9/04	Received Intervenors AFL-CIO & California Labor Federation AFL-CIO's reply in support of petition for rehearing and rehearing en banc of 5 pages; served on 7/9/04 (PANEL ONLY) [03-55166, 03-55169] (gva) [03-55166 03-55169]
7/9/04	Filed Intervenor/Aplts AFL-CIO and CA

Labor Federation AFL-CIO's motion for leave to file reply in support of petition for rehearing and rehearing en banc; served on 7/9/04 (PANEL) [03-55166, 03-55169] (gva) [03-55166 03-55169]

10/12/04 Filed aplt American Federation in 03-55166 additional citations, served on 10/12/04 (PANEL & ALL ACTIVE JUDGES) [03-55166, 03-55169] (mhf) [03-55166 03-55169]

10/22/04 Filed aples' Chamber of Commerce's mtn to strike intervenors' suppl authority; served on 10/22/04 (Copies to PANEL only) (mhf) [03-55166 03-55169]

3/7/05 Received Appellants AFL-CIO's letter dated 3/4/05 re: the status of their mtn for leave to file their reply br in support of the pete for rhrg; (PANEL) [03-55166, 03-55169] (mhf) [03-55166 03-55169]

5/13/05 Filed order FOR PUBLICATION (Robert R. BEEZER, Raymond C. FISHER, Morrison C. England,): The petition for panel rehearing is granted, and the case shall be resubmitted as of the date of this order, without additional oral argument. The panel's opinion is withdrawn and shall not be cited as precedent by or to this court or any district court of the Ninth Circuit, except to the extent adopted by the panel upon rehearing. (redktd to correct entry) [03-55166, 03-

55169] (eu) [03-55166 03-55169]

5/13/05 Case resubmitted on this date to Robert R. BEEZER, Raymond C. FISHER, Morrison C. England. (See 5/13/05 order) submission.) Order filed: 5/13/05. [03-55166, 03-55169] (eu) [03-55166 03-55169]

5/26/05 Filed Chamber of Commerce et al's additional citations, served on 5/26/05 PANEL [03-55166, 03-55169] (gar) [03-55166 03-55169]

9/6/05 FILED OPINION: AFFIRMED (Terminated on the Merits after Oral Hearing; Affirmed; Written, Signed, Published. Robert R. BEEZER, author; Raymond C. FISHER, dissenting; Morrison C. England.) FILED AND ENTERED JUDGMENT. [03-55166, 03-55169] (mhf) [03-55166 03-55169]

9/13/05 Filed Appellant CA Labor Federation, Appellant American Federation's motion to extend time to file petition for rehearing until 10/20/05 [03-55166, 03-55169] served on 9/13/05 [5560991] PANEL [03-55166, 03-55169] (gar) [03-55166 03-55169]

9/23/05 Filed Appellants CA Labor Federation & AFL's unopposed mtn for ext of tm to file brs regarding whether appeal should be reheard en banc & Declaration in support of; served on 9/23/05 [Faxed to PANEL]

[03-55166, 03-55169] (mhf) [03-55166 03-55169]

9/29/05 Filed Appellants Bill Lockyer in 03-55169's joinder to mtn for ext of tm to file brs regarding whether appeal should reheard & declaration in support of; served on 9/28/05 [PANEL] [03-55166, 03-55169] (mhf) [03-55166 03-55169]

10/5/05 Filed order (Robert R. BEEZER, Raymond C. FISHER, Morrison C. England,): Aplts' mtn for ext of tm to file Briefs Regarding Whether Appeal Should Be Reheard En Banc filed on 9/23/05 is GRANTED (Phoned/Faxed: 12:29) in 03-55166, 03-55169 [03-55166, 03-55169] (mhf) [03-55166 03-55169]

10/12/05 Received Appellant American Federation of Labor & Congress's letter dated 10/10/05 re: sveral clerical errors in the caption on the Opinion filed 9/16/05 (PANEL by FED X) [03-55166, 03-55169] (mhf) [03-55166 03-55169]

10/25/05 Filed Intervenors Appellants (AFL-CIO & CA Labor Fed)'s response to crt order of 9/13/05 re Whether this case should be reheard en banc; served on 10/25/05 (PANEL & ALL ACTIVE JUDGES ANY INTERESTED SENIOR JUDGE) [03-55166, 03-55169] (mhf) [03-55166 03-55169]

10/25/05 Filed Appellees (Chamber of Commerce,

et al)'s response to crt order of 9/13/05 re Whether the case should be reheard en banc; served on 10/25/05 (PANEL & ALL ACTIVE JUDGES & ANY INTERESTED SENIOR JUDGE) [03-55166, 03-55169] (mhf) [03-55166 03-55169]

10/26/05 Filed Appellants Bill Lockyer, et al's in response to crt's 9/13/05 as to Whether the appeal should be reheard en banc; served on 10/25/05 (PANEL & ALL ACTIVE JUDGES & ANY INTERESTED SENIOR JUDGE) [03-55166, 03-55169] (mhf) [03-55166 03-55169]

11/2/05 Filed aples' mtn to strike intervenors' aplts' br in support of en banc review; served on 11/2/05 [PANEL only) (mhf) [03-55166 03-55169]

12/15/05 Filed AFL-CIO, CLF additional citations, FRAP 28(j) letter, served on 12/15/05 (PANEL & ALL ACTIVE & INTERESTED SENIOR JUDGES) [03-55166, 03-55169] (ru) [03-55166 03-55169]

1/17/06 Filed order (Mary M. SCHROEDER,): Upon the vote of a majority of nonrecused regular active judges of this crt, it is ordered that this case be reheard by the en banc court pursuant to Circ Rule 35-3. The three-judge panel opinion shall not be cited as precedent by or to this crt or any dc of the 9th Cir, except to the extent adopted by the en banc court. [03-55166,

03-55169] (mhf) [03-55166 03-55169]

1/20/06 Filed order (Mary M. SCHROEDER) The parties shall forward to the clerk of court thirty (30) copies of their original briefs and excerpts of record within 7 days from the date of this order. (phoned/faxed) [03-55166, 03-55169] (gva) [03-55166 03-55169]

1/25/06 Filed order (Mary M. SCHROEDER,): Oral argument shall be reheard en banc in S.F., CA on Tuesday, 3/21/06 at 2:30 p.m. (PHONED/Faxed: 3:08) [03-55166, 03-55169] (mhf) [03-55166 03-55169]

1/25/06 Filed aples' (FAXED) req for ext of time (1 day) to provide copies of brs & excs of rec to enbanc court; [03-55166, 03-55169] served on 1/25/06 [SCHROEDER) (mhf) [03-55166 03-55169]

1/25/06 CALENDARED: SAN FRAN Mar 21 2006 230 pm Courtroom 1 [03-55166, 03-55169] (aw) [03-55166 03-55169]

1/26/06 Recd Aplt Bill Lockyer's opn brs, Jt excs in 2 vols & rpy brs (EN BANC PANEL) [03-55166, 03-55169] (mhf) [03-55166 03-55169]

1/26/06 Recd aplts' req for judicial notice originally filed on 6/20/06 (EN BANC PANEL) [03-55166, 03-55169] (mhf) [03-55166 03-55169]

1/26/06 Received from intervenor appellants AFL-CIO, California Labor Federation: 30 copies of (1) intervenor-appellant's brief filed 4/16/03; (2) reply brief filed 7/14/03; (3) response to appellees' request for judicial notice filed 6/25/03; (4) intervenor appellant's request for judicial notice filed 6/23/03. (to En Banc Court) [03-55166, 03-55169] (ru) [03-55166 03-55169]

1/26/06 Filed notice of appearance of Angela Siera (Withdrew as counsel: [03-55166, 03-55169] (mhf) [03-55166 03-55169]

1/31/06 Recd aple Chamber of Commerce's Answering br & suppl exc in 3 vols (EN BANC PANEL) [03-55166, 03-55169] (mhf) [03-55166 03-55169]

2/2/06 Recd addl copies of Aples' Additional Cites previously filed on 5/26/06 (EN BANC PANEL) [03-55166, 03-55169] (mhf) [03-55166 03-55169]

2/2/06 Recd addl copies of aples' Req for judicial notice previously recd on 5/23/03 (EN BANC PANEL) [03-55166, 03-55169] (mhf) [03-55166 03-55169]

2/3/06 Received from amicus parties 30 copies of (1) brief of amici curiae LPA, Inc. and Associated Builders filed on 6/3/03 and (2) brief of amicus curiae National Labor Relations Board (NLRB) filed on 6/5/03.

(to En Banc Court) [03-55166, 03-55169] (ru) [03-55166 03-55169]

2/6/06 Filed order (Mary M. SCHRODER): Aple Chamber of Commerce's mtn for ext of tm is GRANTED. The Chamber of Commerce's br & excs are ordered filed. in 03-55166, 03-55169 [03-55166, 03-55169] (mhf) [03-55166 03-55169]

2/6/06 Filed Aples Chamber of Commerce, et al's motion to reschedule enbanc oral argument to either 3/22, 23 or 24, 2006; served on 2/6/06 (FAXED to EN BANC PANEL) [5714438] (mhf) [03-55166 03-55169]

2/9/06 Filed order (Mary M. SCHROEDER,): Aple's unopposed mtn to reschedule en banc argument is DENIED because of previous scheduling commitments of the crt. in 03-55166, 03-55169 [03-55166, 03-55169] (mhf) [03-55166 03-55169]

2/9/06 Filed order (Mary M. SCHROEDER,): Upon the vote of a majority of the en banc court, the opinion & dissent filed on 9/6/05, slip op 12167, & appearing at 422 F.3d 973 (9th Cir. 2005), are withdrawn. [03-55166, 03-55169] (mhf) [03-55166 03-55169]

2/23/06 Filed mtn & Declaration by Amicus South Coast Air Quality Management Dist for exemption from Circ Rule 46-5; [03-55166,

03-55169] served on 2/23/06 [5737417] (mhf) [03-55166 03-55169]

2/28/06 Received Amicus South Coast Air Qual in 03-55166, Amicus South Coast Air Qual in 03-55169's brief in 50 copies of 16 pages; deficient: (Mtn pending); served on 2/28/06 (ENBANC PANEL) [03-55166, 03-55169] (mhf) [03-55169]

2/28/06 Filed Amicus South Coast Air Quality Management District motion to become amicus curiae [03-55166, 03-55169] served on 2/28/06 [EN BANC PANEL) (mhf) [03-55166 03-55169]

2/28/06 Received Amicus South Coast Air Quality Management District's brief in 50 copies of 16 pages; served on 2/28/06; deficient: (Mtn to file pending) (EN BANC PANEL) [03-55166, 03-55169] (mhf) [03-55166 03-55169]

3/6/06 Filed order (Mary M. SCHROEDER,): Amicus South Coast Air Quality Management District csl Winter King's mtn for exemption from Circuit Rule 46-5 is GRANTED. in 03-55166, 03-55169 [03-55166, 03-55169] (mhf) [03-55166 03-55169]

3/9/06 Filed order (Mary M. SCHROEDER,): South Cost Air Quality Management District's mtn for leave to file br of amicus curiae is GRANTED. (PHONED/FAXED:

9:46) in 03-55166, 03-55169 [03-55166, 03-55169] (mhf) [03-55166 03-55169]

3/9/06 Filed original and 50 copies South Coast Air Quality's amicus curiae br of 16 pages; served on 2/28/06 [03-55166, 03-55169] (mhf) [03-55166 03-55169]

3/21/06 Filed Los Angeles Taxi Ind's mtn for lv to file amicus br in support of neither party; served on 3/20/06 [EN BANC PANEL) [03-55166, 03-55169] (mhf) [03-55166 03-55169]

3/21/06 Received Amicus Los Angeles Taxi Industry in support of neither party's brief in 50 copies of 19 pages; served on 3/20/06; deficient: (mtn to file pending) (Copies to EN BANC PANEL w/mtn) Notified counsel. [03-55166, 03-55169] (mhf) [03-55166 03-55169]

3/21/06 ARGUED AND SUBMITTED TO Mary M. SCHROEDER, Stephen R. REINHARDT, Robert R. BEEZER, Alex KOZINSKI, Andrew J. KLEINFELD, Michael D. HAWKINS, Sidney R. THOMAS, Barry G. SILVERMAN, M. M. McKEOWN, Kim M. WARDLAW, Raymond C. FISHER, Richard A. PAEZ, Johnnie B. RAWLINSON, Richard R. CLIFTON, CONSUELO M. CALLAHAN [03-55166, 03-55169] (ca) [03-55166 03-55169]

4/26/06 Filed aples Chamber of Commerce, et al's additional citations, served on 4/26/06 (EN BANC PANEL by FED X) [03-55166, 03-55169] (mhf) [03-55166 03-55169]

4/26/06 Filed aples Chamber of Commerce's mtn to take judicial notice; served on 4/26/06 [EN BANC PANEL by FED X) (mhf) [03-55166 03-55169]

5/1/06 Filed Intervenor Aplts (CA Labor Federation & American Federation)'s response to notice of supplemental authority & opposition to req for judicial notice; served on 5/1/06 (EN BANC PANEL by FED X) [03-55166, 03-55169] (mhf) [03-55166 03-55169]

5/16/06 Filed order (Mary M. SCHROEDER,): denying appellee's request for judicial notice. in 03-55166, 03-55169 [03-55166, 03-55169] (mhf) [03-55166 03-55169]

9/21/06 FILED OPINION: REVERSED and its injunction is VACATED. We remand for further proceedings consistent with this opinion (Terminated on the Merits after Oral Hearing; Reversed; Written, Signed, Published. Heard en banc; Mary M. SCHROEDER; Stephen R. REINHARDT; Robert R. BEEZER, dissenting; Alex KOZINSKI; Andrew J. KLEINFELD; Michael D. HAWKINS; Sidney R. THOMAS; Barry G. SILVERMAN; M. M. McKEOWN; Kim M. WARDLAW;

Raymond C. FISHER, author; Richard A. PAEZ; Johnnie B. RAWLINSON; Richard R. CLIFTON; CONSUELO M. CALLAHAN.) FILED AND ENTERED JUDGMENT. [03-55166, 03-55169] (mhf) [03-55166 03-55169]

10/5/06 Filed Aples' motion to stay the mandate; served on 10/5/06 (PANEL) (gva) [03-55166 03-55169]

10/5/06 Filed Aples' motion to stay issuance of mandate; served on 10/5/06 (MMS) 5970201] (gva) [03-55166 03-55169]

11/20/06 Filed order (Mary M. SCHROEDER, Stephen R. REINHARDT, Robert R. BEEZER, Alex KOZINSKI, Andrew J. KLEINFELD, Michael D. HAWKINS, Sidney R. THOMAS, Barry G. SILVERMAN, M. M. McKEOWN, Kim M. WARDLAW, Raymond C. FISHER, Richard A. PAEZ, Johnnie B. RAWLINSON, Richard R. CLIFTON, CONSUELO M. CALLAHAN,): Aples' mtn to stay the mandate filed 10/6/06 is GRANTED. The mandate is stayed pending the filing of a pet for writ of certiorari in the Supreme Court. The stay expires 90 days from the date of this order unless aples file a pet for the writ & so notify the clerk of court in writing within the period of the stay. In that case, the stay shall continue until final disposition by the Supreme Court.

(PHONED/FAXED: 12:01) in 03-55169, 03-55166 [03-55166, 03-55169] (mhf) [03-55166 03-55169]

12/18/06 Received letter from the Supreme Court dated 12/12/06 re: application for an ext of tm to file a pet for a writ of certiorari has been extended to & including 1/5/07 [03-55166, 03-55169] (mhf) [03-55166 03-55169]

1/8/07 Rec'd notice of FIRM NAME CHANGE from Scott A. Kronland for Appellants dated 1/5/07. Chg to: ALTSHULER BERZON LLP. The firm's address & telephone & fax numbers remain the same. [03-55166, 03-55169] (mhf) [03-55166 03-55169]

1/12/07 Received notice from Supreme Court: petition for certiorari filed Supreme Court No. 06-939 filed on 1/5/07. [03-55166, 03-55169] (mhf) [03-55166 03-55169]

2/16/07 Filed aples' motion for further stay until disposition of their pet for writ of certiorari with the Supreme Court; served on 2/16/07 (MMS) (mhf) [03-55166 03-55169]

11/26/07 Received notice from Supreme Court, petition for certiorari GRANTED on 11/20/07 . Supreme Court No. 06-939 PANEL (gar) [03-55166 03-55169]

CHAMBER OF COMMERCE OF THE UNITED STATES, *et. al.*,

Plaintiffs-Appellees,

v.

BILL LOCKYER, in his capacity as Attorney General of the State of California, *et al.*,

Defendants-Appellants,

AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, *et al.*,

Intervenors-Appellants.

On Appeal from the United States

District Court for the Central District of California, Southern Division

No. CV-02-00377-GLT

The Hon. Gary L. Taylor, Judge

Date Filed	#	Docket Text

04/11/2002	1	COMPLAINT filed; Summons(es) not issued; referred to Discovery Arthur Nakazato (mg) (Entered: 04/18/2002)
04/11/2002	2	NOTICE OF INTERESTED PARTIES filed by plaintiffs (mg) (Entered: 04/18/2002)
04/11/2002		SUMMONS issued as to defendants on cmp (mg) (Entered: 04/18/2002)
04/11/2002	3	NOTICE by plaintiffs of related case(s) SA CV 00-1190 GLT (ANx) (mg) (Entered: 04/18/2002)
04/11/2002	4	NOTICE of pendency of other actions or proceedings by plaintiffs (mg) (Entered: 04/18/2002)
04/11/2002		NOTICE OF FILING FEE DUE On Pro Hac Vice Application mailed to attorney Stephen A Bokat for plaintiff Chamb of Comm of US (mg) (Entered: 04/18/2002)
04/23/2002	6	APPLICATION AND ORDER of Non-Resident Attorney to Appear in a Specific Case filed for plaintiff Chamb of Comm of US by Stephen A. Bokat Designating Brent J. North as local counsel. Approved by Judge David O. Carter (Fee pd) (rmi) (Entered: 05/01/2002)

04/25/2002	5	ORDER RE TRANSFER PURSUANT TO GENERAL ORDER 224 (Related Case) filed. [Related Case no.: SACV 00-1190GLT(ANx)] Case transferred from Judge David O. Carter to Judge Gary L. Taylor for all further proceedings. The case number will now reflect the initials of the transferee Judge [SACV 02 7GLT(ANx)] (cc: all counsel) (csb) (Entered: 04/25/2002)
04/30/2002	7	EX PARTE APPLICATION filed by defendants to extend time an additional 30 days, or soon thereafter as practicable, for filing an answer or other responsive pleading to complaint [1-1] as to defendants (mg) (Entered: 05/06/2002)
04/30/2002	8	PROOF OF SERVICE by defendants on 4/30/02 of Ex Parte Appl & Ord Extending Time to Plead & [Proposed Ord GR Ex Parte Appl for Ord Extending Time to Plead] (mg) (Entered: 05/06/2002)
05/01/2002	9	NOTICE OF MOTION AND MOTION by Intervenors American Fed of Labor & Congress of Industrial Organizations & CA

		Labor Fed for leave to intervene as Dfts ; memo in suppt; motion hearing set for 10:00 6/10/02; Lodged Prop Ord (mg) (Entered: 05/06/2002)
05/01/2002	10	MEMO OF P/A IN OPPOSITION by plaintiffs to Dfts' ex parte application to extend time an additional 30 days, or soon thereafter as practicable, for filing an answer or other responsive pleading to complaint [1-1] as to defendants [7-1] (mg) (Entered: 05/06/2002)
05/02/2002	11	ORDER by Judge Gary L. Taylor GRANTING in part DENYING in part Dfts' ex parte application to extend time to file pleading. Dfts shall have to & incl 5/15/02 to file such pleading (mg) (Entered: 05/07/2002)
05/06/2002	12	SUPPLEMENTAL DECL BY STACEY M LEYTON in suppt of obj to intra-district assignment (mg) (Entered: 05/08/2002)
05/08/2002	13	DECLARATION of Rodney Wilkerson by plaintiff Chamb of Comm of US, plaintiff CA Chamber of Comm, plaintiff Employers Group, plaintiff CA Healthcare Assn, plaintiff CA Mfrs & Tech Assn, plaintiff CA Assn

		Health Fac, plaintiff CA Assn Homes & Svcs, plaintiff Bettec Corporation, plaintiff Marksherm Corp, plaintiff Zilaco Inc, plaintiff Zilaco, plaintiff Del Rio Healthcare, plaintiff Beverly Health & Reh, plaintiff Internext Group in suppt of plfs' opp to appl-in-intervention's obj to intradistrict assignment & req for ruling on whether intradist assignment is proper (rmi) (Entered: 05/10/2002)
05/08/2002	14	SUPPLEMENTAL FILING by interventors, American Fed of Labor of Congress of Indust Organizations & Calif Labor Fed, AFL-CIO re applicatns-in-intervention's obj to intradist assignment (rmi) (Entered: 05/10/2002)
05/08/2002	15	OPPOSITION filed by plaintiff Chamb of Comm of US, plaintiff CA Chamber of Comm, plaintiff Employers Group, plaintiff CA Healthcare Assn, plaintiff CA Mfrs & Tech Assn, plaintiff CA Assn Health Fac, plaintiff CA Assn Homes & Svcs, plaintiff Bettec Corporation, plaintiff Marksherm Corp, plaintiff Zilaco Inc, plaintiff Zilaco, plaintiff Del Rio Healthcare, plaintiff Beverly

		Health & Reh, plaintiff Internext Group to application's obj to intradist assign & req for ruling oh whether intradist assign is proper (rmi) (Entered: 05/10/2002)
05/08/2002	16	DECLARATION of Marisela Arvayo by plaintiff Chamb of Comm of US, plaintiff CA Chamber of Comm, plaintiff Employers Group, plaintiff CA Healthcare Assn, plaintiff CA Mfrs & Tech Assn, plaintiff CA Assn Health Fac, plaintiff CA Assn Homes & Svcs, plaintiff Bettec Corporation, plaintiff Marksherm Corp, plaintiff Zilaco Inc, plaintiff Zilaco, plaintiff Del Rio Healthcare, plaintiff Beverly Health & Reh, plaintiff Internext Group in suppt of plfs' opp to applicants-in-intervention's obj to intradist assign & req for ruling on whether intradist assign is proper (rmi) (Entered: 05/10/2002)
05/09/2002	17	APPLICANTS-IN-INTERVENTION'S RESPONSE to Plfs' opposition to applicants-in-intervention's obj to intradistrict assignment [15-1 (mg) (Entered: 05/13/2002)
05/09/2002	18	SECOND SUPPLEMENTAL DECL by Stacey M Leyton in

		suppt of objection to intra-district assignment (mg) (Entered: 05/13/2002)
05/10/2002	19	MINUTES (In Chambers) by Judge Gary L. Taylor: The Unions' obj to assignment of this case to the Central Dist's Southern Div is OVERRULED. This case was duly assigned by the Clerk to Judge Carter in the Southern Div & duly low-numbered from Judge Carter to Judge Taylor: CR: (not present) (mg) (Entered: 05/14/2002)
05/15/2002	20	NOTICE OF MOTION AND MOTION by defendants to dismiss ; motion hearing set for 10:00 6/17/02 (mg) (Entered: 05/16/2002)
05/15/2002	21	MEMORANDUM OF P/A IN SUPPORT by defendants of motion to dismiss [20-1] (mg) (Entered: 05/16/2002)
05/15/2002	22	DECLARATION of Suzanne M. Ambrose by defendants in suppt of motion to dismiss [20-1] (mg) (Entered: 05/16/2002)
05/15/2002	23	PROOF OF SERVICE by defendants on 5/15/02 of Mot & mot to dism, Memo of P/A in suppt, decl of Suzanne M. Ambrose in suppt of mot to dism (see doc for

		fur details) (mg) (Entered: 05/16/2002)
05/23/2002	24	APPLICANTS-IN-INTERVENTION'S EX PARTE APPLICATION filed to continue hrg date on Plf's mot for summ jgm (mg) (Entered: 05/24/2002)
05/23/2002	25	DECLARATION of Stacey M Leyton in suppt of ex parte application to continue hrg date on Plf's mot for summ jgm [24-1] (mg) (Entered: 05/24/2002)
05/24/2002	26	NOTICE OF MOTION AND MOTION by plaintiffs for summary judgment , or in the alt for partial summary judgment ; motion hearing set for 10:00 6/17/02 (mg) (Entered: 05/28/2002)
05/24/2002	27	MEMORANDUM OF P/A IN SUPPORT by plaintiffs of motion for summary judgment [26-1], or in the alt for partial summary judgment (mg) (Entered: 05/28/2002)
05/24/2002	28	REQUEST by plaintiffs for Judicial Notice in suppt of Plfs' motion for summary judgment [26-1], or in the alt for partial summary judgment [26-2] (mg) (Entered: 05/28/2002)

05/24/2002	29	NOTICE OF LODGING of non-federal authorities & federal non-statutory by plaintiffs (mg) (Entered: 05/28/2002)
05/24/2002	30	DECLARATION of Nancy Armentrout by plaintiffs in suppt of Plfs' motion for summary judgment [26-1], for partial summary judgment [26-2] (mg) (Entered: 05/28/2002)
05/24/2002	31	DECLARATION of Stephen A. Bokat by plaintiffs in suppt of Plfs' motion for summary judgment [26-1], for partial summary judgment [26-2] (mg) (Entered: 05/28/2002)
05/24/2002	32	DECLARATION of Ronald S. Cohen by plaintiffs in suppt of motion for summary judgment [26-1], for partial summary judgment [26-2] (mg) (Entered: 05/28/2002)
05/24/2002	33	DECLARATION of William Dahlman by plaintiffs in suppt of Plfs' motion for summary judgment [26-1], for partial summary judgment [26-2] (mg) (Entered: 05/28/2002)
05/24/2002	34	DECLARATION of Steven Highland by plaintiffs in suppt of Plfs' motion for summary judgment [26-1], for partial summary judgment [26-2] (mg)

		(Entered: 05/28/2002)
05/24/2002	35	DECLARATION of Roger Hunte by plaintiffs in suppt of motion for summary judgment [26-1], for partial summary judgment [26-2] (mg) (Entered: 05/28/2002)
05/24/2002	36	DECLARATION of Anne Burns Johnson by plaintiffs in suppt of Plfs' motion for summary judgment [26-1], for partial summary judgment [26-2] (mg) (Entered: 05/28/2002)
05/24/2002	37	DECLARATION of Fred Main by plaintiffs in suppt of Plfs' motion for summary judgment [26-1], for partial summary judgment [26-2] (mg) (Entered: 05/28/2002)
05/24/2002	38	DECLARATION of Brent J North by plaintiffs in suppt of Plfs' motion for summary judgment [26-1], for partial summary judgment [26-2] (mg) (Entered: 05/28/2002)
05/24/2002	39	DECLARATION of Art Sponseller by plaintiffs in suppt of Plfs' motion for summary judgment [26-1], for partial summary judgment [26-2] (mg) (Entered: 05/28/2002)
05/24/2002	40	DECLARATION of Jack M. Stewart by plaintiffs in suppt of Plfs' motion for summary

		judgment [26-1], for partial summary judgment [26-2] (mg) (Entered: 05/28/2002)
05/24/2002	41	DECLARATION of Mort Swales by plaintiffs in suppt of Plfs' motion for summary judgment [26-1], for partial summary judgment [26-2] (mg) (Entered: 05/28/2002)
05/24/2002	42	DECLARATION of Gary Wheeler by plaintiffs in suppt of Plfs' motion for summary judgment [26-1], for partial summary judgment [26-2] (mg) (Entered: 05/28/2002)
05/24/2002	43	DECLARATION of Daniel Zilafro by plaintiffs in suppt of Plfs' motion for summary judgment [26-1], for partial summary judgment [26-2] (mg) (Entered: 05/28/2002)
05/24/2002	44	PROOF OF SERVICE by plaintiff on 5/24/02 of Ntc of Mot & Mot for Summ Jgm, or in the alt, Partial Summ Jgm; Plfs' Memo of P/A in Suppt of Its Mot for Summ Jgm; [Prop} Ord GR Plfs' Mot for Summ Jgm or, in the alt, Partial Summ Jgm; (see doc for fur details) (mg) (Entered: 05/28/2002)
05/24/2002	45	NTC OF NON-OPP by plaintiffs to Intervenors' ntc of mot & mot for leave to intervene as Dfts [9-1] (mg) (Entered: 05/28/2002)

05/28/2002	46	EX PARTE APPLICATION filed by defendants for order to continue the hrg on Plfs' mot for summ jgm &/or request to set a sched conf purs to FRCP 16(b) (mg) (Entered: 05/29/2002)
05/28/2002	47	MEMO OF P/A IN OPPOSITION by plaintiffs to ex parte application for order to continue the hrg on Plfs' mot for summ jgm [46-1], &/or request to set a sched conf purs to FRCP 16(b) [46-2]. Decl of Brent J. North in suppt thereof (mg) (Entered: 05/29/2002)
05/28/2002	48	SUPPLEMENTAL FILING IN SUPPORT by applicants-in-intervention of ex parte application for order to continue the hrg on Plfs' mot for summ jgm [46-1], request to set a sched conf purs to FRCP 16(b) [46-2] (mg) (Entered: 05/29/2002)
05/28/2002	49	DECLARATION of Catherine Z. Ysrael by defendants in suppt of ex parte application for order to continue the hrg on Plfs' for summ jgm [46-1], to request to set a sched conf purs to FRCP 16(b) [46-2] (mg) (Entered: 05/29/2002)
05/28/2002	50	DECLARATION of Suzanne M. Ambrose by defendants in suppt of ex parte application for order to

		continue the hrg on Plfs' mot for summ jgm [46-1], to request to set a sched conf purs to FRCP 16(b) [46-2] (mg) (Entered: 05/29/2002)
05/28/2002	51	DECLARATION of Stacey M. Leyton by defendants in suppt of suppl filing in suppt of ex parte application for order to continue the hrg on Plfs' mot for summ jgm [46-1], to request to set a sched conf purs to FRCP 16(b) [46-2] (mg) (Entered: 05/29/2002)
05/28/2002	52	DECL OF SERVICE by defendants on 5/28/02 of 1) Ex parte appl for ord cont the hrg on Plfs' mot for summ jgm &/or req to set a sched conf, 2) Decl of Suzanne M. Ambrose in suppt of ex parte appl for ord cont the hrg on Plf's mot for summ jgm &/or req to set a sched conf (see doc for fur details) (mg) (Entered: 05/29/2002)
05/28/2002	53	MINUTES (In Chambers): plfs' motion for summary judgment [26-1] & motion for partial summary judgment [26-2] is continued to 10:00 7/15/02; if appropriate, plfs may file suppl mot papers nlt 3:00 p.m. on 6/19/02; any opp papers are due not 3:00 p.m. on 6/26/02; rply papers are due nlt 3:00 p.m. on 7/3/2; the motions to intervene

		& dism sched for hrg 6/10/02 & 6/17/02 respectively remain on cal; any pty may file proper motions for inj rel if appropriate; the hrg for plfs' mot for summ jgm sched for 6/17/02 is taken off cal; by Judge Gary L. Taylor CR: none present (rmi) (Entered: 05/30/2002)
05/30/2002		PLACED IN FILE - NOT USED; [Proposed] Ord GR Ex parte appl for ord cont the hrg on Plfs' mot for summ jgm &/or req to set a sched conf purs to FRCP; ldg 5/28/02 (mg) (Entered: 05/31/2002)
05/30/2002		PLACED IN FILE - NOT USED; [Proposed] Ord GR ex parte mot to cont hrg date on Plf's mot for summ jgm; ldg 5/23/02 (mg) (Entered: 05/31/2002)
05/31/2002	54	NOTICE OF WAIVER of oral argument on motion for leave to intervene as Dfts [9-1] purs to LR 7-15 (mg) (Entered: 06/03/2002)
05/31/2002	54	REQUEST to enter order GR leave to intervene by Proposed Intervenors (mg) (Entered: 06/03/2002)
05/31/2002	55	DECLARATION of Stacey M. Leyton in suppt of Ntc of waiver of oral argument on mot for lv to

		intervene as Dfts [54-1], & request to enter order GR leave to intervene [54-1] (mg) (Entered: 06/03/2002)
05/31/2002	56	PROOF OF SERVICE by plaintiffs on 5/24/02 of Ntc of Mot & mot for summ jgm, or in the alt, part summ jgm; Plfs' memo of P/A in suppt of its mot for summ jgm or in the alt, part summ jgm; [Proposed] Ord GR Plfs' mot for summ jgm (see doc for fur details) (mg) (Entered: 06/03/2002)
05/31/2002	57	PROOF OF SERVICE by plaintiff on 5/24/02 of Ntc of mot & mot for summ jgm, or in the alt, partial summ jgm; Plfs' memo of P/A in suppt of its mot for summ jgm, or in the alt, partial summ jgm; [Proposed] Ord GR Plfs' mot for summ jgm (see doc for fur details) (mg) (Entered: 06/03/2002)
05/31/2002	58	PROOF OF SERVICE by plaintiffs on 5/28/02 of Memo of P/A in opp to applicants-in-intervention's ex parte mot to cont hrg date of Plfs' mot for summ jgm; decl of Brent J North in suppt thereof (mg) (Entered: 06/03/2002)
06/04/2002		PLACED IN FILE - NOT USED; [Proposed] Ord GR waiver of oral argument & mot for lv to

		intervene; ldg 5/31/02 (mg) (Entered: 06/05/2002)
06/04/2002	59	ORDER by Judge Gary L. Taylor granting request to enter order granting leave to intervene [54-1] (mg) (Entered: 06/05/2002)
06/04/2002	60	ANSWER filed by intervenors to complaint [1-1] (mg) (Entered: 06/05/2002)
06/04/2002	61	STIPULATION and ORDER by Judge Gary L. Taylor cont hearings on Dfts' motion to dismiss [20-1] to 7/1/02; Plfs' mot for summary judgment [26-1], or partial summary judgment [26-2] to 8/26/02 (mg) (Entered: 06/05/2002)
06/05/2002		PLACED IN FILE - NOT USED; Applicants-in-intervention's objection to intradistrict assignment & request for ruling on whether intradistrict assignment is proper; rcd 5/3/02 (mg) (Entered: 06/06/2002)
06/05/2002	62	ORDER by Judge Gary L. Taylor RE: 1) Early Meeting of Ptys, 2) Sched Conf; scheduling conf set for 9:00 10/21/02 (see doc for fur details) (mg) (Entered: 06/07/2002)
06/13/2002	63	NOTICE of entry of order GR

		AFLC-CIO & CA Labor Fed's mot for lv to intervene by intervenors AFL-CIO, CA Labor Fed AFL-CIO (mg) (Entered: 06/17/2002)
06/17/2002	64	MEMO OF P/A IN OPPOSITION by plaintiffs to Dfts' motion to dismiss [20-1] (mg) (Entered: 06/18/2002)
06/17/2002	65	DECLARATION of Brent J North by plaintiffs in suppt of Plfs' Memo of P/A in opp to motion to Dfts' mot to dismiss [20-1] (mg) (Entered: 06/18/2002)
06/17/2002	66	REQUEST by plaintiffs for Judicial Notice (mg) (Entered: 06/18/2002)
06/17/2002	67	NOTICE by plaintiffs of continuance of hrg & briefing sched on Dfts' mot to dism & Plfs' mot for summ jgm, or, in the alt partial summ jgm (mg) (Entered: 06/18/2002)
06/17/2002	68	NOTICE by plaintiffs of lodging of non-fed authorities & fed non-statutory (mg) (Entered: 06/18/2002)
06/18/2002	69	PROOF OF SERVICE by plaintiffs on 6/17/02 of Plf's memo of P/A in opp to Dfts' mot to dism; decl of Brent North in suppt thereof (see

		doc for fur details) (mg) (Entered: 06/19/2002)
06/20/2002	70	JOINT RULE 26 DISCOVERY PLAN filed; est length of trial 2 days (mg) (Entered: 06/25/2002)
06/24/2002	71	REPLY by defendants to Plfs' opp to Dfts' motion to dismiss [20-1] (filed as Plfs' reply to Dfts' Opp to Plfs' Mot to Dism) (mg) (Entered: 06/26/2002)
06/24/2002	72	REQUEST by defendants for Judicial Notice (mg) (Entered: 06/26/2002)
06/24/2002	73	DECLARATION OF SERVICE by defendant on 6/24/02 of Plfs reply to Dfts' Opp to Plfs' Mot to Dism; Dfts' Req for Jud Ntc (mg) (Entered: 06/26/2002)
06/28/2002	74	REQUEST by plaintiff for Judicial Notice re motion to dismiss [20-1] (mg) (Entered: 07/01/2002)
06/28/2002	75	DECLARATION of Mark A Johnson by plaintiffs in suppt of Plfs' req for judicial ntc re motion to dismiss [20-1] (mg) (Entered: 07/01/2002)
06/28/2002	76	DECLARATION of Nancy Armentrout by plaintiffs in suppt of Plfs' req for jud ntc re motion to dismiss [20-1] (mg) (Entered:

		07/01/2002)
06/28/2002	77	DECLARATION of Stephen A Bokat by plaintiffs in suppt of Plfs' req for jud ntc re motion to dismiss [20-1] (mg) (Entered: 07/01/2002)
06/28/2002	78	DECLARATION of Art Sponseller by plaintiffs in suppt of Plfs' req for jud ntc re motion to dismiss [20-1] (mg) (Entered: 07/01/2002)
06/28/2002	79	DECLARATION of William Dahlman by plaintiffs in suppt of Plfs' req for jud ntc re motion to dismiss [20-1] (mg) (Entered: 07/01/2002)
06/28/2002	80	PROOF OF SERVICE by plaintiffs on 6/28/02 of Req for Jud Ntc; decls of William Dahlman, Art Sponseller, Stepehen A Bokat, Mark A Johnson & Nancy Armentrout in suppt thereof (mg) (Entered: 07/01/2002)
06/28/2002	81	NOTICE OF ERRATA by defendants correcting reply to Plfs opp to Dfts' mot to dism [71-1] (mg) (Entered: 07/02/2002)
07/01/2002	83	MINUTES by Judge Gary L. Taylor: Dfts' mot to dism is GR as to the Dept of Health Services, only. Motion to dism is denied in all other respects. The Crt will

		issue its written order in the near future. CR: Sally Marshall (mg) (Entered: 07/18/2002)
07/02/2002	82	ORDER by Judge Gary L. Taylor denying Dfts' motion to dismiss for lack of subject mtr jurisdiction [20-1]. (mg) (Entered: 07/03/2002)
07/02/2002		PLACED IN FILE - NOT USED Stip of plas voluntary dism of dft Dept of Health Srvs (csb) (Entered: 07/05/2002)
07/23/2002	84	STIPULATION and ORDER by Discovery Arthur Nakazato allowing leave for Dfts to exceed by 4 the limit of 10 depos contained in FRCP Rule 30(a) in order to take the depos of all the Plfs (mg) (Entered: 07/27/2002)
07/26/2002	85	ANSWER filed by defendants Bill Lockyer, Frank G Vanacore, Diana M Bonta to complaint [1-1] (mt) (Entered: 08/01/2002)
07/26/2002	86	DECLARATION OF SERVICE VIA FAX AND US MAIL by defendant on 7/26/02 of dfts' answer to complaint (mt) (Entered: 08/01/2002)
08/02/2002	87	NOTICE OF ASSOCIATION of Counsel for plaintiffs by attorneys Michael J Lotito, Bradley W

		Kampas, Scott W Oborne of Jackson Lewis LLP (mg) (Entered: 08/09/2002)
08/05/2002	88	PROOF OF SERVICE by intervenors AFL-CIO, CA Labor Fed AFL-CIO on 8/5/02 of Intervenor's Ntc of Cross-mot; Intervenors' Memo in Support of Cross-mot; [Proposed] Stmt of Uncontroverted Facts; (see doc for further details) (tso) (Entered: 08/09/2002)
08/05/2002	89	NOTICE OF MOTION AND MOTION by Dfts Bill Lockyer, Frank G Vanacore, Diana M Bonta for summary judgment , or in the alt for partial summary judgment ; motion hearing set for 10:00 8/26/02 (mg) (Entered: 08/09/2002)
08/05/2002	90	NOTICE OF CROSS-MOTION & CROSS-MOTION by intervenors AFL-CIO, CA Labor Fed AFL-CIO for summary judgment , or in the alt for partial summary judgment ; motion hearing set for 10:00 8/26/02 (mg) (Entered: 08/09/2002)
08/05/2002	91	MEMORANDUM OF P/A IN SUPPORT by intervenors AFL-CIO, CA Labor Fed AFL-CIO of cross-motion for summary judgment [90-1], cross-motion for partial summary judgment [90-2]

		(mg) (Entered: 08/09/2002)
08/05/2002	92	DECLARATION of Scott A. Kronland by intervenors AFL-CIO, CA Labor Fed AFL-CIO in suppt of cross-motion for summary judgment [90-1], cross-motion for partial summary judgment (mg) (Entered: 08/09/2002)
08/05/2002	93	MEMORANDUM OF P/A IN SUPPORT by defendants of Dfts' motion for summary judgment [89-1], or in the alt, for partial summary judgment (mg) (Entered: 08/09/2002)
08/05/2002	94	DECLARATION of Suzanne M. Ambrose by defendants in suppt of Dfts' motion for summary judgment [89-1], or in the alt for partial summary judgment [89-2] (mg) (Entered: 08/09/2002)
08/05/2002	95	DECLARATION of Barbara Hardiman by defendants in suppt of mot for summary judgment [89-1], or in the alt, for partial summary judgment [89-2] (mg) (Entered: 08/09/2002)
08/05/2002	96	DECLARATION of Gene Morrow by defendants in suppt of Dfts' motion for summary judgment [89-1], or in the alt, for partial summary judgment [89-2] (mg)

		(Entered: 08/09/2002)
08/05/2002	97	DECLARATION of Frank Vanacore by defendants in suppt of Dfts' motion for summary judgment [89-1], or in the alt, for partial summary judgment [89-2] (mg) (Entered: 08/09/2002)
08/08/2002	98	CERTIFICATION OF SERVICE by plaintiffs on 8/5/02 of Assoc of Plf's Cnsl (mg) (Entered: 08/14/2002)
08/09/2002	99	STIPULATION and ORDER by Judge Gary L. Taylor cont hearing on motion for summary judgment [26-1], partial summary judgment [26-2], [90-1], [90-2], [89-1], [89-2] to 10:00 9/9/02. The ptys' opp jgm will be fld & served on or before 8/19/02; & the ptys replies to the aforementioned Opps will be fld & svc on or before 8/26/02 (mg) (Entered: 08/15/2002)
08/19/2002	100	MEMO OF P&A IN OPPOSITION by defendants to plfs' motion for summary judgment [26-1] or, in the alt, partial summary judgment [26-2] (mt) (Entered: 08/20/2002)
08/19/2002	101	DECLARATION of Suzanne M Ambrose by defendants in opp to plfs' motion for summary judgment [26-1] or, in the alt

		partial summary judgment [26-2] (mt) (Entered: 08/20/2002)
08/19/2002	102	DECLARATION of Frank Vanacore by defendants in suppt of dfts' opp to plfs' motion for summary judgment [26-1] or, in the alt for partial summary judgment [26-2] (mt) (Entered: 08/20/2002)
08/19/2002	103	STATEMENT of genuine issues by defendants in opp to plfs' motion for summary judgment [26-1] or, in the alt partial summary judgment [26-2] (mt) (Entered: 08/20/2002)
08/19/2002	104	OBJECTIONS TO EVIDENCE SUBMITTED BY PLFS filed by defendants in suppt of plfs motion for summary judgment [26-1]; and opp to plfs' req for judicial ntc (mt) (Entered: 08/20/2002)
08/19/2002	105	DECLARATION OF SERVICE by defendants on 8/18/02 of dfts' opp to plfs' mot for S/J or, in the alt, partial S/J & supporting docs (mt) (Entered: 08/20/2002)
08/19/2002	106	MEMO IN OPPOSITION by intervenors to plfs' motion for summary judgment [26-1] or, in the alt partial summary judgment [26-2] (mt) (Entered: 08/20/2002)

08/19/2002	107	DECLARATION of Fred Azcarate by intervenors in opp to plfs motion for summary judgment [26-1] (mt) (Entered: 08/20/2002)
08/19/2002	108	DECLARATION of Stacey M Leyton by intervenors purs to FRCP 56(f) in opp to plfs' motion for summary judgment [26-1] (mt) (Entered: 08/20/2002)
08/19/2002	109	DECLARATION of Scott A Kronland by intervenors in opp to plfs' motion for summary judgment [26-1] (mt) Modified on 08/20/2002 (Entered: 08/20/2002)
08/19/2002	110	DECLARATION of Nicholas Ross by intervenors in opp to plfs' motion for summary judgment [26-1] (mt) Modified on 08/20/2002 (Entered: 08/20/2002)
08/19/2002	111	DECLARATION of Scott A Kronland by intervenors in opp to plfs' motion for summary judgment [26-1] (Volume II) (mt) (Entered: 08/20/2002)
08/19/2002	112	OBJECTIONS filed by intervenors to evidence proffered by plfs in suppt of plfs' motion for summary judgment [26-1] and opp to plfs' request for judicial notice (mt) (Entered: 08/20/2002)

08/19/2002	113	STATEMENT of genuine issues by intervenors in opp to plfs' motion for summary judgment [26-1] (mt) (Entered: 08/20/2002)
08/19/2002	114	PROOF OF SERVICE by intervenor on 8/19/02 of Intervenors' memo in opp to plfs' mot for S/J or, in the alt, partial S/J; (see doc for further specifics) (mt) (Entered: 08/20/2002)
08/19/2002	115	MEMO OF P&A IN OPPOSITION by plaintiffs to dfts & intervenors motion for summary judgment [89-1], motion for partial summary judgment [89-2], motion for summary judgment [90-1], motion for partial summary judgment [90-2] (mt) (Entered: 08/20/2002)
08/19/2002	116	DECLARATION of Mark E Reagan by plaintiffs (mt) (Entered: 08/20/2002)
08/19/2002	117	DECLARATION of Nancy Armentrout by plaintiffs in suppt of plfs' opp to dfts' and intervenors' motion for summary judgment [89-1], motion for partial summary judgment [89-2], motion for summary judgment [90-1], motion for partial summary judgment [90-2] (mt) (Entered: 08/20/2002)
08/19/2002	118	DECLARATION of Darryl Nixon

		by plaintiffs (mt) (Entered: 08/20/2002)
08/19/2002	119	DECLARATION of Bradley W Kampas by plaintiffs in opp to dfts and intervenors' motion for summary judgment [89-1], motion for partial summary judgment [89-2], motion for summary judgment [90-1], motion for partial summary judgment [90-2] (mt) (Entered: 08/20/2002)
08/19/2002	120	STATEMENT of genuine issues by plaintiffs in opp to dfts' motion for summary judgment [89-1], motion for partial summary judgment [89-2] (mt) (Entered: 08/20/2002)
08/19/2002	121	STATEMENT of genuine issues by plaintiffs in opp to intervenors' motion for summary judgment [90-1], motion for partial summary judgment [90-2] (mt) (Entered: 08/20/2002)
08/19/2002	122	CERTIFICATE OF SERVICE by plaintiffs on 8/19/02 of plfs' memo of P&A in opp to dfts' & intervenors' motions for S/J, or in the alt, partial summary judgment; (see doc for further specifics) (mt) (Entered: 08/20/2002)
08/20/2002	123	STATEMENT of genuine issues in

		opp by intervenor AFL-CIO, intervenor CA Labor Fed AFL-CIO re motion for summary judgment [89-1], motion for partial summary judgment [89-2] (dmjr) (Entered: 08/22/2002)
08/21/2002	124	Joint STIPULATION and ORDER re lv to file memo of PA in excess of page limitation & ext of time for filing & srving rply papers by Judge Gary L. Taylor. It is ord that plfs are permitted to file 35 pg memo in opp to dfts & intervenors mot for summ jgm. The ptys are permitted to exceed pg limitations for rply briefs by 10 pgs. The ptys are permitted to file rply briefs on 8/30/02. (twdb) (Entered: 08/23/2002)
08/30/2002	125	REQUEST by intervenors AFL-CIO, CA Labor Fed AFL-CIO for Judicial Notice in suppt of reply in suppt of Intv's cross-motion for summary jgm [90-1], or in the alt, partial summary judgment [90-2] (mg) (Entered: 09/05/2002)
08/30/2002	126	REPLY MEMO by intervenors AFL-CIO, CA Labor Fed AFL-CIO in suppt of Intv's mot for summary judgment [90-1], or in the alt, for partial summary judgment [90-2] (mg) (Entered: 09/05/2002)

08/30/2002	127	REPLY DECLARATION of Scott A Kronland by intervenors AFL-CIO & CA Labor Fed AFL-CIO in suppt of Intv's cross-mot for summary judgment [90-1], or in the alt, partial summary judgment (mg) (Entered: 09/05/2002)
08/30/2002	128	OBJECTIONS TO EVIDENCE PROFFERED BY PLFS, filed by intervenors AFL-CIO & CA Labor Fed AFL-CIO in opp to Intv's cross-motion for summary judgment [90-1], [90-2] (mg) (Entered: 09/05/2002)
08/30/2002	129	SUPPL DECLARATION of Darryl Nixon by plaintiffs in suppt of Plfs' motion for summary judgment [26-1], [26-2] (mg) (Entered: 09/05/2002)
08/30/2002	130	MEMO OF P/A IN REPLY by defendants to Plfs' opp to Dfts' motion for summary judgment [89-1], or in the alt, partial summary judgment (mg) (Entered: 09/05/2002)
08/30/2002	131	DECLARATION of Suzanne M Ambrose by defendants in suppt of Dfts' reply to Plfs' opp to Dfts' motion for summary judgment [89-1], or in the alt, partial summary judgment [89-2] (mg) (Entered: 09/05/2002)

08/30/2002	132	OBJECTIONS by defendants to evidence submitted by Plfs in suppt of Plfs' opp to Dfts' motion for summary judgment [89-1], for partial summary judgment [89-2] (mg) (Entered: 09/05/2002)
08/30/2002	133	DECLARATION of Matthew J Antonek by plaintiffs (mg) (Entered: 09/05/2002)
08/30/2002	134	DECLARATION of Arleen Doan by plaintiffs (mg) (Entered: 09/05/2002)
08/30/2002	135	DECLARATION of Sam Park by plaintiffs (mg) (Entered: 09/05/2002)
08/30/2002	136	REQUEST by defendants for Judicial Notice in suppt of Dft's reply to Plfs' opp to Dfts' motion for summary judgment [89-1], or in the alt, partial summary judgment [89-2] (mg) (Entered: 09/05/2002)
08/30/2002	137	REPLY BRIEF by plaintiff Chamb of Comm of US in suppt of its motion for summary judgment [26-1], or in the alt, for partial summary judgment [26-2] (mg) (Entered: 09/05/2002)
08/30/2002	138	DECLARATION of Bradley W Kampas by plaintiff Chamb of

		Comm of US in reply to Dfts' & Intv's Opp to Plf's motion for summary judgment [26-1], or in the alt for partial summary judgment [26-2] (mg) (Entered: 09/05/2002)
08/30/2002	139	PROOF OF SERVICE by intervenors AFL-CIO, CA Labor Fed AFL-CIO on 8/30/02 of Intv's reply memo in suppt of Intvs' mot for summ jgm, or in the alt, partial summ jgm; reply dec of Scott A Kronland in suppt of Intvs' cross-mot for summ jgm (see doc for fur details) (mg) (Entered: 09/05/2002)
08/30/2002	140	DECL OF SERVICE by defendants on 8/30/02 of Dfts' memo of P/A in reply to Plfs' opp to Dfts' mot for summ jgm, or in the alt, partial summ jgm; Dfts' req for judicial ntc in suppt of Dfts' reply to Plfs' opp to Dfts' mot for summ jgm (see doc for fur details) (mg) (Entered: 09/05/2002)
09/05/2002	141	EX PARTE APPLICATION filed by intervenors AFL-CIO, CA Labor Fed AFL-CIO to strike evidence submitted by Plfs in suppt of reply memo in suppt of mot for summ jgm ; Lodged Prop Order (mg) (Entered: 09/09/2002)
09/05/2002	142	DECLARATION of Scott A

		Kronland by intervenors AFL-CIO, CA Labor Fed AFL-CIO in suppt of Intv's ex parte application to strike [141-1] & purs to FRCP 56(f) (mg) (Entered: 09/09/2002)
09/05/2002	143	PROOF OF SERVICE by intervenors AFL-CIO, CA Labor Fed AFL-CIO on 9/5/02 of Intv's ex parte mot to strike evidence submitted by Plfs in suppt of reply memo in suppt of mot for summ jgm; decl of Scott A Kronland (see doc for fur details) (mg) (Entered: 09/09/2002)
09/06/2002	144	EX PARTE APPLICATION filed by defendants for ord striking Plfs' new evidence submitted in suppt of Plfs' reply to Dfts' opp to Plfs' mot for summ jgm , or in the alt to continue hrg on Plf's mot for summ jgm ; Lodged Prop Ord (mg) (Entered: 09/11/2002)
09/06/2002	145	MEMORANDUM OF P/A IN SUPPORT by defendants of ex parte application for ord striking Plfs' new evidence submitted in suppt of Plfs' reply to Dfts' opp to Plfs' mot for summ jgm [144-1], or in the alt, to continue hrg on Plf's mot for summ jgm [144-2] (mg) (Entered: 09/11/2002)
09/06/2002	146	DECLARATION of Suzanne M

		Ambrose by defendants in suppt of ex parte application for ord striking Plfs' new evidence submitted suppt of Plfs' reply to Dfts' opp to Plfs' mot for summ jgm [144-1], or in the alt, to continue hrg on Plf's mot for summ jgm [144-2] (mg) (Entered: 09/11/2002)
09/06/2002	147	PROOF OF SERVICE by defendants on 9/6/02 of Ex parte appl for ord striking Plfs' new evidence submitted in suppt of Plfs' reply to Dfts' opp to Plfs' mot for summ jgm, or in the alt, cont hrg on Plfs' mot for summ jgm (see doc for fur details) (mg) (Entered: 09/11/2002)
09/09/2002	148	MINUTES by Judge Gary L. Taylor: The fol mots for summ jgm, or in the alt, partial summ jgm, are taken under submission: Mot by Dfts Bill Lockyer, Frank G Vanacore & Diana M Bonta [89-1], [89-2]; Cross-mot by Intvs [90-1], [90-2]; & Mot by Plfs [26-1], [26-2]. CR: Sally Marshall (mg) (Entered: 09/12/2002)
09/16/2002	149	ORDER by Judge Gary L. Taylor GRANTING in part DENYING in part Plfs' motion for summary judgment [26-1], [26-2] (see doc for

		fur details) (mg) (Entered: 09/18/2002)
09/24/2002	150	MINUTES (in chambers): by Judge Gary L. Taylor: inappropriate correspondence w/Crt dated 9/20/02; any such communication shld be by appropriate, filed, pleading; CR: none present (see doc for specifics) (ln) (Entered: 09/26/2002)
09/25/2002		PLACED IN FILE - NOT USED; Intervenors' [Proposed] stmt of uncontroverted facts & concl of law in suppt of mot for summ jgm or, in the alt, partial summ jgm; ldg 8/5/02 (mg) (Entered: 09/30/2002)
09/25/2002		PLACED IN FILE - NOT USED; [Proposed] stmt of uncontroverted facts & concl of law in suppt of Plfs' mot for summ jgm or, in the alt, partial summ jgm; ldg 5/24/02 (mg) (Entered: 09/30/2002)
09/25/2002		PLACED IN FILE - NOT USED; [Proposed] Ord GR Plfs' mot for summ jgm or, in the alt, partial summ jgm; ldg 5/24/02 (mg) (Entered: 09/30/2002)
09/26/2002	152	NOTICE OF MOTION AND MOTION by defendants for reconsideration of the court's order granting plfs' motion for summary

		judgment in part ; motion hearing set for 10:00 10/21/02 (mt) (Entered: 10/03/2002)
09/26/2002	153	POINTS AND AUTHORITIES IN SUPPORT by defendants of dfts' motion for reconsideration of the court's order granting plfs' motion for summary judgment in part [152-1] (mt) (Entered: 10/03/2002)
09/26/2002	154	DECLARATION of Phyllis Cheng by defendants in suppt of dfts' motion for reconsideration of the court's order granting plfs' motion for summary judgment in part [152-1] (mt) (Entered: 10/03/2002)
09/26/2002	155	DECLARATION OF SERVICE by defendants on 9/26/02 of motion for reconsideration and supporting docs (mt) (Entered: 10/03/2002)
09/26/2002	156	REQUEST by defendants for Judicial Notice in suppt of dfts' motion for reconsideration of the court's order granting plfs' motion for summary judgment in part [152-1] (mt) (Entered: 10/03/2002)
09/26/2002	157	NOTICE OF MOTION AND MOTION by intervenors AFL-CIO, CA Labor Fed AFL-CIO for reconsideration ; motion hearing set for 10:00 10/21/02 (mt) (Entered: 10/03/2002)

09/26/2002	158	REQUEST by intervenors AFL-CIO, CA Labor Fed AFL-CIO for Judicial Notice in suppt of motion for reconsideration [157-1]; decl of Scott A Kronland,; exhibits A-C (mt) (Entered: 10/03/2002)
09/26/2002	159	PROOF OF SERVICE by intervenor AFL-CIO, intervenor CA Labor Fed AFL-CIO on 9/26/02 of Intervenors' ntc of motion & motion for reconsideration (see doc for fur details) (mt) (Entered: 10/03/2002)
10/01/2002	151	MINUTES (in chambers): by Judge Gary L. Taylor: cnsl has contacted Crt, asking if further Ord is going to be issued on the recent mots for summ jgm; Crt is not planning to issue further Ord; any pty may make any addl mot they deem appropriate; CR: none present (see doc for specifics) (ln) (Entered: 10/02/2002)
10/03/2002	160	RECEIPT OF TRANSCRIPT of proceedings for the following date(s): 7/1/02; CR: Sally Marshall (mg) (Entered: 10/10/2002)
10/03/2002		TRANSCRIPT filed for proceedings held on 7/1/02 (mg) (Entered: 10/10/2002)
10/09/2002	161	STIPULATION and ORDER by

		Judge Gary L. Taylor cont hearing on Dfts' & Intervenors' motions for reconsideration [157-1], [152-1] to 10:00 11/18/02. Sched conf cont to 10:00 11/18/02 . (mg) (Entered: 10/11/2002)
10/18/2002	162	DECLARATION OF SERVICE by defendants on 10/16/02 of Stip & Order to cont the hrg & briefing sched on Dfts' & Intervenors' mots for recon & the sched conf (mg) (Entered: 10/28/2002)
11/04/2002	163	Memorandum of points and authorities in OPPOSITION by plaintiff to motion for reconsideration [157-1], motion for reconsideration of the court's order granting plfs' motion for summary judgment in part [152-1] (csb) (Entered: 11/09/2002)
11/12/2002	164	STIPULATION and ORDER by Judge Gary L. Taylor, continuing the hearing on motion for reconsideration [157-1] 10:00 1/6/03, hearing motion for reconsideration of the court's order granting plfs' motion for summary judgment in part [152-1] 10:00 1/6/03, continuing the scheduling conference to 10:00 1/6/03 (bp) (Entered: 11/18/2002)
11/19/2002	165	DECLARATION OF SERVICE by

		defendant on 11/15/02 of Stipulation and Order to continue hearing on Defendants' and Intervenors' motions for reconsideration and the scheduling conference (mg) (Entered: 11/25/2002)
12/27/2002	167	STIPULATION filed re joint request to reschedule 1/6/03 motions hearing & scheduling conference if accompanying stipulation and proposed order is not approved (mg) (Entered: 01/06/2003)
01/03/2003	166	JUDGMENT AND ORDER by Judge Gary L. Taylor: Judgment is hereby entered as follows: CA Govt Code sections 16645.2 and 16645.7 are hereby declared to be invalid as applied to employers covered by the National Labor Relations Act. Court finds sections 16645.2 and 16645.7 to be preempted by the National Labor Relations Act and thus invalied under the Supremacy Clause. Dfts and Intervenors as well as their agents, servants, and employees and those persons in active concert of participation with them who receive actual notice of this order, are hereby enjoined and restrained from taking any actions to enforce

		CA Govt Code sections 16645.2 and 16645.7 on behalf of the people of the State of California against any employer covered by the National Labor Relations Act; terminating case (MD JS-6) (mt) (Entered: 01/03/2003)
01/03/2003	168	STIPULATION and ORDER by Judge Gary L. Taylor GRANTING IN PART Defendants' & Intervenors' motions for reconsideration [157-1], [152-1] (see documents for further details) (mg) (Entered: 01/07/2003)
01/03/2003		PLACED IN FILE - NOT USED; [Proposed] Order granting Defendants' motion for reconsideration of the Court's order granting Plaintiffs' motion for summary judgment in part; lodged 9/26/02 (mg) (Entered: 01/07/2003)
01/03/2003		PLACED IN FILE - NOT USED; [Proposed] Order granting intervenors' motion for reconsideration of the Court's order granting Plaintiffs' motion for summary judgment in part; lodged 9/26/02 (mg) (Entered: 01/07/2003)
01/03/2003		PLACED IN FILE - NOT USED; Joint stipulation & [proposed]

		order granting Defendants' & Intervenors' motion for reconsideration in part & granting request for partial final judgment regarding California government code sections 16645.2 & 16645.7 (mg) (Entered: 01/07/2003)
01/07/2003	169	NOTICE OF APPEAL by intervenors American Federation of Labor and Congress of Industrial Organizations and California Labor Federation,AFL-CIO to 9th C/A from Dist. Court jgm fld 1/3/03 [166-2] (cc: Altshuler,Berzon,Nussbaum,Rubin & Demain;Attorney General of the State of California;State Attorney General;Hopper Lundy & Bookman,Inc.;Jackson Lewis LLP;Stephen A. Bokat) Fee: Billed. (ghap) (Entered: 01/09/2003)
01/07/2003	170	REPRESENTATION STATEMENT re appeal [169-1] (ghap) (Entered: 01/09/2003)
01/07/2003	171	PROOF OF SERVICE by intervenors American Federation of Labor and Congress of Industrial Organizations and California Labor Federation,AFL-CIO. (ghap) (Entered: 01/09/2003)
01/07/2003		LODGED Civil Appeals Docketing

		Statement submitted by intervenors American Federation of Labor and Congress of Industrial Organizations and California Labor Federation,AFL-CIO. (fwd to 9th cca) (ghap) (Entered: 01/09/2003)
01/10/2003	172	APPLICATION FOR EX PARTE APPLICATION filed by intervenors for order staying judgment pending appeal (mg) (Entered: 01/13/2003)
01/10/2003	173	PROOF OF SERVICE by intervenors on 1/10/03 of Application for ex parte order staying judgment pending appeal (mg) (Entered: 01/13/2003)
01/13/2003	174	NOTICE OF CHANGE Of Address filed by attorneys Mark A Johnson and Mark E Reagan for plaintiff Internext Group. The new address for Hooper, Lundy & Bookman Inc is 180 Montgomery Street, Suite 1000, San Francisco, CA 94104. The telephone number & fax number remain the same (mg) (Entered: 01/14/2003)
01/13/2003	175	NOTICE OF APPEAL by defendant California Attorney General Bill Lockyer, defendant Diana M Bonta, defendant Frank G Vanacore to 9th C/A from Dist.

		Court Judgment & Order filed on 1/3/03, [166-2] (cc: Suzanne M. Ambrose; Hopper Lundy & Bookman; Scott W. Oborne; Stephen A. Bokat; Richard T. Waldow; Altshuler, Berzon, Nussbaum, Rubin & Demain; O'Melveny & Myers) Fee: Billed (weap) (Entered: 01/14/2003)
01/13/2003	176	REPRESENTATION STATEMENT re appeal [175-1] (weap) (Entered: 01/14/2003)
01/13/2003		LODGED Civil Appeals Docketing Statement submitted by defendant Bill Lockyer, defendant Diana M Bonta, defendant Frank G Vanacore (FWD TO CRD) (weap) (Entered: 01/14/2003)
01/13/2003	177	PROOF OF SERVICE by defendant Bill Lockyer, defendant Diana M Bonta, defendant Frank G Vanacore on 1/10/03 of Notice of Appeal from Judgment enterd on 1/3/03; Representation Statement for Appeal & Civil Appeals docketing Statement. (weap) (Entered: 01/14/2003)
01/14/2003	178	OPPOSITION by plaintiffs to Intervenors' ex parte application for order staying judgment pending appeal [172-1] (mg) (Entered: 01/15/2003)

01/14/2003	179	DECLARATION of Bradley W Kampas by plaintiffs in support of Plaintiffs' opposition to Intervenors' ex parte application for order staying judgment pending appeal [172-1] (mg) (Entered: 01/15/2003)
01/14/2003	180	MINUTES (In Chambers) by Judge Gary L. Taylor: denying Intervenor's ex parte application for order staying judgment pending appeal [172-1]; CR: (not present) (mg) (Entered: 01/15/2003)
01/14/2003		PLACED IN FILE - NOT USED; [Proposed] order staying judgment pending appeal; lodged 1/10/03 (mg) (Entered: 01/16/2003)
01/16/2003	181	TRANSCRIPT DESIGNATION and ordering form for dates: 9/9/02 CR: Sally Marshall. (ghap) (Entered: 01/16/2003)
01/24/2003		Appeal Fee Paid re [175-1] fee in amount of $ 105.00 (Receipt # 31294) (dlu) (Entered: 01/24/2003)
01/24/2003	182	EX PARTE APPLICATION filed by defendants for order staying judgment pending appeal ; Lodged Proposed Order (mg) (Entered: 01/24/2003)

01/24/2003	183	DECLARATION OF SERVICE by defendants on 1/23/03 of Application for ex parte order staying judgment pending appeal & [proposed] order (mg) (Entered: 01/24/2003)
01/27/2003	184	MINUTES (in chambers): dft's ex parte application for order staying judgment pending appeal [182-1] is DENIED; by Judge Gary L. Taylor CR: none present (ln) (Entered: 01/28/2003)
01/27/2003		PLACED IN FILE - NOT USED; [Proposed] Order staying judgment pending appeal; lodged 1/24/03 (mg) (Entered: 01/30/2003)
01/29/2003	185	OPPOSITION by plaintiffs to Defendants' ex parte application for order staying judgment pending appeal [182-1] (mg) (Entered: 01/31/2003)
01/31/2003	186	NOTIFICATION by Circuit Court of Appellate Docket Number appeal [169-1] 03-55166 (pjap) (Entered: 01/31/2003)
01/31/2003	187	NOTIFICATION by Circuit Court of Appellate Docket Number appeal [175-1] 03-55169 (pjap) (Entered: 01/31/2003)
02/03/2003	189	TRANSCRIPT DESIGNATION

		and ordering form for dates: 9/9/02 CR: Sally Marshall (dlu) (Entered: 02/05/2003)
02/04/2003		Appeal Fee Paid re [169-1] fee in amount of $ 105.00 (Receipt # 31827) (dlu) (Entered: 02/04/2003)
02/04/2003	188	NOTICE OF CLERICAL ERROR: case number is changed from SACV02-37 GLT(ANx) to SACV02-377 GLT(ANx); doc was docketed to correct case number however was scanned to incorrect case number; (ln) (Entered: 02/04/2003)
03/17/2003	190	ORDER FROM USCA appellants' motion to consolidated these appeals is granted. Appeal Nos. 03-55166 and 03-55169 are consolidated. Appellants' motion to stay the district court's judgment pending appeal is denied. (03-55166 & 03-55169) (ghap) (Entered: 03/24/2003)
03/21/2003	191	RECEIPT for reporter's transcript (twdb) (Entered: 03/24/2003)
03/21/2003	192	REPORTER'S TRANSCRIPT of proceedings filed. on 9/9/02 (twdb) (Entered: 03/24/2003)
07/28/2003	193	CLERK'S record on appeal transmitted to Circuit [175-1], [169-1] vols: 11, 2 brown folders of

		docket no. B0066, B0111, transcripts: 2. Missing document: Docket no. 162 not included. (03-55166, 03-55169) (pjap) (Entered: 07/28/2003)
07/28/2003	194	CERTIFICATE of Record Transmitted to USCA (03-55169) (cc: all parties) (pjap) (Entered: 07/28/2003)
07/28/2003	195	CERTIFICATE of Record Transmitted to USCA (03-55166) (cc: all parties) (pjap) (Entered: 07/28/2003)
01/17/2006	196	ORDER from 9th CCA filed, CCA # 03-55166, 03-55169. Order received in this district on 1/20/06. Upon the vote of a majority of nonrecused regular active judges of this court, it is ordered that this case be reheard by the en banc court pursuant to Circuit Rule 35-3. The three-judge panel opinion shall not be cited as precedent by or to this court or any district court of the Ninth Circuit, except to the extent adopted by the en banc court. (ghap,) (Entered: 01/23/2006)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

The Chamber of Commerce of the United States, California Chamber of Commerce Employers Group, California Healthcare Association, California Manufacturers and Technology Association, California Association of Health Facilities, California Association of Homes & Services for the Aging, Bettec Corporation, Marksherm Corporation, Zilaco, Inc., Zilaco Del Rio Healthcare Inc., Beverly Health & Rehabilitation Services, Inc. dba Beverly Manor — Costa Mesa, Internext Group,

Plaintiffs,

v.

Bill Lockyer in his capacity as Attorney General of the State of California, The Department of Health Services, Frank G. Vanacore as the Chief of the Audit Review and Analysis Section of the California Department of Health Services, and Diana M. Bontá, R.N., Dr., P.H. as the Director of the California Department of Health Services and DOES 1 through 10,

Defendants.

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

Plaintiffs CHAMBER OF COMMERCE OF THE UNITED STATES ("US Chamber"), CALIFORNIA CHAMBER OF COMMERCE ("California Chamber"), EMPLOYERS GROUP, CALIFORNIA HEALTHCARE ASSOCIATION ("CHA"), CALIFORNIA MANUFACTURERS AND TECHNOLOGY ASSOCIATION ("CMTA"), CALIFORNIA ASSOCIATION OF HEALTH FACILITIES ("CAHF"), CALIFORNIA ASSOCIATION OF HOMES & SERVICES FOR THE AGING ("CAHSA"), BETTEC CORPORATION ("Bettec"), MARKSHERM CORPORATION ("Marksherm"), ZILACO, INC., ZILACO, DEL RIO HEALTH CARE, INC. ("Del Rio"), BEVERLY HEALTH & REHABILITATION SERVICES, INC. dba BEVERLY MANOR — COSTA MESA ("Beverly Manor"), and THE INTERNEXT GROUP ("Internext"), (collectively, "Plaintiffs"), by and through their counsel, for their complaint against defendants, BILL LOCKYER, Attorney General of the State of California ("Attorney General") the Department of Health Services, Frank G. Vanacore as the Chief of the Audit Review and Analysis Section of the California Department of Health Services, and Diana M. Bontá, R.N., Dr., P.H. as the Director of the California Department of Health Services and DOES 1 through 10 (collectively, "Defendants"), upon knowledge and belief allege:

I. JURISDICTION AND VENUE

1. This Court has jurisdiction over the subject matter of this suit pursuant to 28 U.S.C. Section 1331 as Plaintiffs' claims arise under:

a. the due process and equal protection

provisions of the Fourteenth Amendment to the United States Constitution – which incorporates the free speech provisions of the First Amendment.

b. Article VI of the United States Constitution which designates the Constitution and Laws of the United States as the supreme Law of the Land; and

c. the laws of the United States, namely, the National Labor Relations Act, 29 U.S.C. Section 141 *et seq*, the Labor Management Reporting and Disclosure Act, 29 U.S.C. Section 401 *et seq*, and the Medicare Act and Medicaid Act, 42 U.S.C. Section 1395 *et seq.* and 1396 *et seq.*

2. This Court has supplemental jurisdiction over this subject matter pursuant to 28 U.S.C. Section 1367(a) as Plaintiffs' claims, arising under the California Constitution, are so closely related to the federal question claims that they form part of the same case or controversy under Article III of the United States Constitution.

3. Venue is proper in this Court pursuant to 28 U.S.C. Section 1391(b) as this Court is sited in the Federal judicial district where a substantial part of the events giving rise to Plaintiffs' claims have occurred, are now occurring, and will occur in the future if not curtailed through actions of this Court. Employer members of Plaintiffs US Chamber, California Chamber, Employers Group, CHA, CMTA, CAHF, and CAHSA are situated in this district and

are and will continue to be adversely affected by the irreparable harms sought to be remedied and prevented by this Court's action upon this Complaint. In addition, Plaintiffs CAHF, Bettec, Zilaco, Inc., Zilaco, Marksherm, Del Rio and Internext are situated in Los Angeles County and are and will continue to be affected by the harms sought to be remedied by this Complaint. Beverly Manor is located in Orange County and is and will continue to be adversely affected by the harms sought to be remedied by this Complaint.

II. NATURE OF ACTION

4. This action seeks declaratory relief pursuant to the Declaratory Relief Act, 28 U.S.C. Sections 2201-2202, that California Assembly Bill 1889, contained in California Government Code Sections 16645 through 16649 ("AB 1889"), is unconstitutional under the Federal and California Constitutions, is preempted under the National Labor Relations Act, 29 U.S.C. Section 151 *et seq.* ("NLRA"), the Labor Management Reporting and Disclosure Act, 29 U.S.C. Section 401 *et seq.* ("LMRDA"), and is preempted by and violates the provisions of the California State Medicaid Plan established pursuant to the requirements of the Medicare Act, 42 U.S.C. Section 1395 *et seq.* ("Medicare Act") and Medicaid Act, 42 U.S.C. Section 1996 *et seq.* ("Medicaid Act"). It also seeks preliminary and permanent injunctive relief enjoining the enforcement of AB 1889 and other related actions undertaken by defendants pursuant to its provisions. (A copy of AB 1889 is attached hereto as Exhibit A.)

III. PARTIES

5. Plaintiff US Chamber is the world's largest business federation, representing an underlying membership of more than three million businesses and organizations of every size and in every industry sector and region of the country. It has approximately 11,000 members in the state of California. A principle function of the US Chamber is to represent the interests of its members on issues of vital concern to the business community before the Congress, the Executive Branch and the courts.

6. More than one of the US Chamber's member employers receive grants of state funds, have contracts with the State of California under which they receive payments from the State in excess of $50,000 and receive state funds in excess of $10,000 in a calendar year on account of their participation in state programs. Some of these employers provide services to the state in excess of $50,000. Some of these employers have employees who perform services on service contracts for the state and seek reimbursement from the state. Some of these employers are currently experiencing organizing activities of labor organizations, and expect to continue to experience such labor organizing activities because a union representation election is scheduled in the future. Some of these employers have their supervisors and other management personnel inform employees who perform work on state contracts of the potential drawbacks of membership in a labor organization and the benefits of maintaining a direct relationship with management. Some of these employers pay legal

counsel with respect to the organizing activity to advise them of their legal rights and responsibilities under the National Labor Relations Act and to assist them with union organizing drives and election campaigns in an effort to inform employees of the potential drawbacks of membership in a labor organization and the benefits of maintaining a direct relationship with management. Some of these employers pay and retain consultants to assist them with organizing and election campaigns in an effort to inform employees of the potential drawbacks of membership in a labor organization and the benefits of maintaining a direct relationship with management. Some of these employers pay their supervisory and management employees to assist in communicating to employees the potential drawbacks of membership in a labor organization and the benefits of maintaining a direct relationship with management. Some of these employers incur expenses related to the creation and distribution of print and other materials for the purpose of communicating to employees the potential drawbacks of membership in a labor organization and the benefits of maintaining a direct relationship with management. Some of these employers lease property from the State of California to hold meetings with employees and supervisors for the purpose of informing employees of the potential drawbacks of membership in a labor organization and the benefits of maintaining a direct relationship with management. These properties are not equally available to the general public to hold meetings free of charge. The certification and reporting requirements of AB 1889 will cost these employers significant sums of money and resources. In order to

attempt to comply with the requirements of AB 1889, these employers must expend significant sums of money and resources. Materials, products and services of these employers affect interstate commerce and cross state lines.

7. Plaintiff California Chamber is an association of 13,000 employers who employ three million California employees. One of the purposes of the California Chamber is to inform employees and assist member employers' efforts to inform employees about labor unions. Specifically, one of the purposes of the California Chamber is to inform its member employers regarding how to lawfully advise their employees of the disadvantages of unionizing. The California Chamber further exists to ease legislative and administrative burdens of California employers. Protecting member employers' free speech rights, National Labor Relations Act rights, equal protection rights and right to counsel is directly germane to the purpose of the California Chamber.

8. More than one of California Chamber's member employers receive grants of state funds, have contracts with the State of California under which they receive payments from the State in excess of $50,000 and receive state funds in excess of $10,000 in a calendar year on account of their participation in state programs. Some of these employers provide services to the state in excess of $50,000. Some of these employers have employees who perform services on service contracts for the state and seek reimbursement from the state. Some of these employers are currently experiencing organizing activities of labor organizations, and expect to continue to experience such labor organizing

activities because a union representation election is scheduled in the future. Some of these employers have their supervisors and other management personnel inform employees who perform work on state contracts of the potential drawbacks of membership in a labor organization and the benefits of maintaining a direct relationship with management. Some of these employers pay legal counsel with respect to the organizing activity to advise them of their legal rights and responsibilities under the National Labor Relations Act and to assist them with union organizing drives and election campaigns in an effort to inform employees of the potential drawbacks of membership in a labor organization and the benefits of maintaining a direct relationship with management. Some of these employers pay and retain consultants to assist them with organizing and election campaigns in an effort to inform employees of the potential drawbacks of membership in a labor organization and the benefits of maintaining a direct relationship with management. Some of these employers pay their supervisory and management employees to assist in communicating to employees the potential drawbacks of membership in a labor organization and the benefits of maintaining a direct relationship with management. Some of these employers incur expenses related to the creation and distribution of print and other materials for the purpose of communicating to employees the potential drawbacks of membership in a labor organization and the benefits of maintaining a direct relationship with management. Some of these employers lease property from the State of California to hold meetings with employees and supervisors for the

purpose of informing employees of the potential drawbacks of membership in a labor organization and the benefits of maintaining a direct relationship with management. These properties are not equally available to the general public to hold meetings free of charge. The certification and reporting requirements of AB 1889 will cost these employers significant sums of money and resources. In order to attempt to comply with the requirements of AB 1889, these employers must expend significant sums of money and resources. Materials, products and services of these employers affect interstate commerce and cross state lines.

9. The Employers Group is an association of employers whose members include 4,700 employers in California who employ over one million California employees. One of the purposes of the Employers Group is to assist member employers' efforts to inform employees about labor unions. Specifically, one of the purposes of the Employers Group is to advise its member employers regarding how to lawfully discuss with their employees the key considerations of unionizing. The Employers Group further exists to help ease legislative and administrative burdens of California employers. Protecting member employers' First Amendment free speech rights, National Labor Relations Act rights, equal protection rights and right to counsel is directly germane to the purpose of the Employers Group.

10. More than one of the Employers Group's member employers receive grants of state funds, have contracts with the State of California under which they receive payments from the State in excess of $50,000 and receive state funds in excess of $10,000

in a calendar year on account of their participation in state programs. Some of these employers provide services to the state in excess of $50,000. Some of these employers have employees who perform services on service contracts for the state and seek reimbursement from the state. Some of these employers are currently experiencing organizing activities of labor organizations, and expect to continue to experience such labor organizing activities because a union representation election is scheduled in the future. Some of these employers have their supervisors and other management personnel inform employees who perform work on state contracts of the potential drawbacks of membership in a labor organization and the benefits of maintaining a direct relationship with management. Some of these employers pay legal counsel with respect to the organizing activity to advise them of their legal rights and responsibilities under the National Labor Relations Act and to assist them with union organizing drives and election campaigns in an effort to inform employees o the potential drawbacks of membership in a labor organization and the benefits of maintaining a direct relationship with management. Some of these employers pay and retain consultants to assist them with organizing and election campaigns in an effort to inform employees of the potential drawbacks of membership in a labor organization and the benefits of maintaining a direct relationship with management. Some of these employers pay their supervisory and management employees to assist in communicating to employees the potential drawbacks of membership in a labor organization and the benefits of maintaining a direct relationship with

management. Some of these employers incur expenses related to the creation and distribution of print and other materials for the purpose of communicating to employees the potential drawbacks of membership in a labor organization and the benefits of maintaining a direct relationship with management. Some of these employers lease property from the State of California to hold meetings with employees and supervisors for the purpose of informing employees of the potential drawbacks of membership in a labor organization and the benefits of maintaining a direct relationship with management. These properties are not equally available to the general public to hold meetings free of charge. The certification and reporting requirements of AB 1889 will cost these employers significant sums of money and resources. In order to attempt to comply with the requirements of AB 1889, these employers must expend significant sums of money and resources. Materials, products and services of these employers affect interstate commerce and cross state lines.

11. The CHA is an association of healthcare employers whose members include approximately 432 employers in California who employ approximately 380,000 California employees. One of the purposes of the CHA is to inform employees and assist member employers' efforts to inform employees about labor unions. Specifically, one of the purposes of the CHA is to inform its member employers regarding how to lawfully advise their employees of the advantages and disadvantages of unionizing. The CHA further exists to ease legislative and administrative burdens of California healthcare employers. Protecting member employers' free

speech rights, National Labor Relations Act rights, equal protection rights and right to counsel is directly germane to the purpose of the CHA.

12. More than one of CHA's member employers receive grants of state funds, have contracts with the State of California under which they receive payments from the State in excess of $50,000 and receive state funds in excess of $10,000 in a calendar year on account of their participation in state programs. Some of these employers provide services to the state in excess of $50,000. Some of these employers have employees who perform services on service contracts for the state and seek reimbursement from the state. Some of these employers are currently experiencing organizing activities of labor organizations, and expect to continue to experience such labor organizing activities because a union representation election is scheduled in the future. Some of these employers have their supervisors and other management personnel inform employees who perform work on state contracts of the potential drawbacks of membership in a labor organization and the benefits of maintaining a direct relationship with management. Some of these employers pay legal counsel with respect to the organizing activity to advise them of their legal rights and responsibilities under the National Labor Relations Act and to assist them with union organizing drives and election campaigns in an effort to inform employees of the potential drawbacks of membership in a labor organization and the benefits of maintaining a direct relationship with management. Some of these employers pay and retain consultants to assist them with organizing and election campaigns in an effort

to inform employees of the potential drawbacks of membership in a labor organization and the benefits of maintaining a direct relationship with management. Some of these employers pay their supervisory and management employees to assist in communicating to employees the potential drawbacks of membership in a labor organization and the benefits of maintaining a direct relationship with management. Some of these employers incur expenses related to the creation and distribution of print and other materials for the purpose of communicating to employees the potential drawbacks of membership in a labor organization and the benefits of maintaining a direct relationship with management. Some of these employers lease property from the State of California to hold meetings with employees and supervisors for the purpose of informing employees of the potential drawbacks of membership in a labor organization and the benefits of maintaining a direct relationship with management. These properties are not equally available to the general public to hold meetings free of charge. Some of these employers are state government hospitals and public employers which receive state funds. The certification and reporting requirements of AB 1889 will cost these employers significant sums of money and resources. In order to attempt to comply with the requirements of AB 1889, these employers must expend significant sums of money and resources. Materials, products and services of these employers affect interstate commerce and cross state lines.

13. The CMTA is an association of employers whose members include approximately 800 employers in California who employ upwards of

one million California employees. The CMTA exists to ease legislative and administrative burdens of California employers. One of the purposes of the CMTA is to assist member employers' efforts to inform employees about labor unions. Specifically, one of the purposes of the CMTA is to inform its member employers regarding how to advise their employees of the disadvantages of unionizing. Protecting member employers' First Amendment free speech rights, National Labor Relations Act rights, equal protection rights and right to counsel is directly germane to the purpose of the CMTA.

14. More than one of the CMTA's member employers receive grants of state funds, have contracts with the State of California under which they receive payments from the State in excess of $50,000 and receive state funds in excess of $10,000 in a calendar year on account of their participation in state programs. Some of these employers provide services to the state in excess of $50,000. Some of these employers have employees who perform services on service contracts for the state and seek reimbursement from the state. Some of these employers are currently experiencing organizing activities of labor organizations, and expect to continue to experience such labor organizing activities because a union representation election is scheduled in the future. Some of these employers have their supervisors and other management personnel inform employees who perform work on state contracts of the potential drawbacks of membership in a labor organization and the benefits of maintaining a direct relationship with management. Some of these employers pay legal counsel with respect to the organizing activity to

advise them of their legal rights and responsibilities under the National Labor Relations Act and to assist them with union organizing drives and election campaigns in an effort to inform employees of the potential drawbacks of membership in a labor organization and the benefits of maintaining a direct relationship with management. Some of these employers pay and retain consultants to assist them with organizing and election campaigns in an effort to inform employees of the potential drawbacks of membership in a labor organization and the benefits of maintaining a direct relationship with management. Some of these employers pay their supervisory and management employees to assist in communicating to employees the potential drawbacks of membership in a labor organization and the benefits of maintaining a direct relationship with management. Some of these employers incur expenses related to the creation and distribution of print and other materials for the purpose of communicating to employees the potential drawbacks of membership in a labor organization and the benefits of maintaining a direct relationship with management. Some of these employers lease property from the State of California to hold meetings with employees and supervisors for the purpose of informing employees of the potential drawbacks of membership in a labor organization and the benefits of maintaining a direct relationship with management. These properties are not equally available to the general public to hold meetings free of charge. The certification and reporting requirements of AB 1889 will cost these employers significant sums of money and resources. In order to attempt to comply with the requirements of AB 1889,

these employers must expend significant sums of money and resources. Materials, products and services of these employers affect interstate commerce and cross state lines.

15. The CAHF is an association representing approximately 1,600 licensed skilled nursing facilities ("SNFs"), intermediate care facilities ("ICFs") and intermediate care for the developmentally disabled facilities ("ICF-DDs") in the State of California (collectively, "long term care facilities"). While the CAHF represents member organizations that are organized as both "for profit" and "not for profit" entities, the majority of its membership operates long term care facilities organized as "for profit" entities. The CAHF members employ approximately -72,000 employees. The CAHF exists to advocate on behalf of its member long term care facilities before all relevant governmental bodies, including the executive, legislative and judicial branches of the state and federal governments in order to ensure that the interests of such facilities are advanced and not impaired in all material respects. One of the fundamental purposes of the CAHF is to protect the interests of its member facilities in their role as participants in the Medicaid program (known as Medi-Cal in California), including ensuring that governmental action involving the Medi-Cal program is consistent with the California State Medicaid Plan ("State Plan") and federal Medicaid laws and regulations. Such governmental action includes the application of federal and state requirements involving the establishment of facility reimbursement under Medi-Cal (such as cost reporting, rate setting and auditing) as well as the quality of care to be

provided by facilities in order to participate in the Medi-Cal program. Another fundamental purpose of the CAHF is to protect members in their roles as employers, including ensuring that the public policy defining the relations between member facilities and their employees remains consistent with the rights and privileges secured by the United States and California Constitutions, the National Labor Relations Act and other federal and state labor laws and are not compromised or violated in any manner. The specific issues raised in this Complaint and the interests underlying the issues are entirely consistent with the CAHF's mission and purpose as well as the services provided to its members.

16. Not only do the vast majority of CAHF's members receive funds in excess of $10,000 through the Medi-Cal program in each calendar year (in the form of reimbursement for services provided to beneficiaries), they are also heavily dependent on the revenue provided through this program. Numerous CAHF member facilities (including SNFs, ICFs and ICF-DDs) obtain as much as 75% to 100% of their revenue through the Medi-Cal program. The restrictions on the use of such funds has had and will continue to have dramatic effects on member facilities' abilities to exercise their protected Constitutional and statutory rights. For example, some of these member facilities have experienced, are experiencing and/or will likely experience organizing activities of labor organizations which have led to or may lead to an union representation election. Others have experienced, are experiencing and/or will likely experience activity undertaken by employees represented by a labor organization to decertify the union which has led to or may lead to an election.

Facilities faced with either of the above situations regularly pay legal counsel or other professional consultants to advise these employers of their legal rights under the National Labor Relations Act and to assist them with union organizing drives and election campaigns in an effort to inform employees of the potential drawbacks of membership in a labor organization and benefits of maintaining or regaining a direct relationship with management. Some of these employers pay their supervisory and management employees to assist in communicating to employees the potential drawbacks of membership in a labor organization and the benefits of maintaining or regaining a direct relationship with management. Some of these employers incur expenses related to the creation and distribution of print and other materials for the purpose of communicating to employees the potential drawbacks of membership in a labor organization and the benefits of maintaining a direct relationship with management. In addition, in order to attempt to comply with the requirements of AB 1889, these employers must expend significant sums of money and resources. Employers will also expend significant sums of money and resources in order to attempt to comply with the certification and reporting requirements of AB 1889. The services provided by CAHF's members and the products and material utilized by such members affect interstate commerce.

17. The CAHSA is a nonprofit, charitable, California corporation that represents the interests of approximately 380 long term care, seniors housing and seniors services members. The CAHSA members operate approximately 10,200 skilled nursing beds in

128 SNF facilities throughout the state, each of which is licensed and regulated by the DHS. As with the CAHF's members, the CAHSA's members are similarly dependent on the Medi-Cal program for revenue. Unlike the CAHF, the CAHSA members must be organized as "not for profit" organizations that are sponsored by religious, fraternal, government, neighborhood, minority or ethnic organizations, and each must be governed by a bona fide volunteer board and be exempt from federal tax. In advocating for its members, the CAHSA's fundamental purpose and mission is substantially the same as the purpose and mission of CAHF. Numerous CAHSA member facilities receive a portion of their revenue through the Medi-Cal program. Some of these member facilities have experienced, are experiencing and/or will likely experience organizing activities of labor organizations which have led to or may lead to a union representation election. The restrictions AB 1889 places on the use of these facilities funds has had and will continue to have dramatic effects on member facilities' abilities to exercise their protected Constitutional and statutory rights. In addition, the impact of the provisions of AB 1889 are substantially the same as for the employer members of the CAHF.

18. Plaintiffs US Chamber, California Chamber, Employers Group, CHA, CMTA, CAHF and CAHSA have organizational standing as each has at least one member employer which has standing in its own right to present the claims asserted herein. Further, the interests sought to be protected are germane to the associations' purposes, and neither the claims asserted nor the relief requested requires that the members participate

individually in the suit.

19. Members of Plaintiffs' US Chamber, California Chamber, Employers Group, CHA, CMTA, CAHF, arid CAHSA have faced, are currently facing and/or will likely face union organizing and/or decertification activities. As a result of AB 1889, these members' constitutional and statutory rights are presently being chilled, impaired and impermissibly interfered with. Further, attempts at compliance with AB 1889 will require significant employer expenditures.

20. Bettec Corporation is the holder of a valid license issued by the Department of Health Services ("DHS") to operate the 99 bed SNF known as Sunray East Convalescent Hospital in Los Angeles, California ("Sunray"). Sunray currently participates in the Medi-Cal program and is heavily dependent on its continued participation in the program. Sunray expects that it will incur expenditures for services provided by legal counsel and/or professional consultants to advise it of its legal rights under the National Labor Relations Board involving Union organizing activity. It will also educate and train its supervisors and other management personnel on such legal rights and the manner of informing employees of the potential drawbacks of membership in a labor organization and the benefits of maintaining a direct relationship with management. It expects to pay its supervisors and other management personnel for these activities. It also expects to create and distribute print and other materials. Based upon its heavy reliance on the Medi-Cal program and the prohibitions of AB 1889, it will likely be unable to take any of these protected

actions. In addition, Sunray will be required to expend significant financial resources in order to attempt to comply with the provisions of AB 1889. It will also be required to spend significant monies to attempt to comply with the certification and reporting requirements of AB 1889.

21. Marksherm is the holder of a valid license issued by the DHS to operate the 69 bed SNF known as Crescent Bay Convalescent Hospital in Santa Monica, California ("Crescent Bay"). Crescent Bay currently participates in the Medi-Cal program and is heavily dependent on its continued participation in the program. Certain employees of Crescent Bay are currently represented by a labor organization but no collective bargaining agreement has been reached between the labor organization and the represented employees. Crescent Bay expects to incur expenditures for services provided by legal counsel as to its rights under the National Labor Relations Act if no agreement can be reached and how to communicate to its employees, through supervisors and other management personnel, or otherwise. Such communication will likely involve supervisors and other management employees who will need education and training and will need to be paid for these activities. The creation and distribution of print and other materials may also be necessary. Based upon its heavy reliance on the Medi-Cal program and the prohibitions of AB 1889, it will likely be unable to take any of these protected actions. In addition, Crescent Bay will be required to expend significant financial resources to attempt to comply with the provisions of AB 1889. It will also be required to spend significant monies to attempt to comply with the certification and reporting

requirements of AB 1889.

22. Zilaco, Inc. is the holder of a valid license issued by the DHS to operate the 46 bed SNF known as CherryLee Lodge Sanitarium in El Monte, California ("CherryLee"). CherryLee currently participates in the Medi-Cal program and is heavily dependent on the continued participation in the program. In particular, approximately 90% of CherryLee's revenue is received from reimbursement provided through the Medi-Cal program. Certain employees are currently represented by a labor organization. However, some of the represented employees are seeking the decertification of the labor organization and have circulated a petition amongst themselves. CherryLee requires legal advice as to its legal rights under the National Labor Relations Act but, because of its heavy reliance on the Med-Cal program and the prohibitions of AB 1889, cannot obtain such advice. It likewise needs to communicate with its employees and will need to utilize supervisors and other management personnel to do so. It may also need to create and distribute print or other materials for this purpose. As with legal advice, it may be unable to take any of these protected activities. If CherryLee could take any of these actions, it would also incur significant expense in attempting to comply with the provisions of AB 1889 and its certification and reporting requirements.

23. Zilaco is the holder of a valid license issued by the DHS to operate the 59 bed SNF known as El Monte Care Center located in El Monte, California ("El Monte"). El Monte currently participates in the Medi-Cal program and is heavily dependent on the continued participation in the

program. In particular, approximately 88% of El Monte's revenue is received from reimbursement provided through the Medi-Cal program. Certain employees are currently represented by a labor organization. However, some of the represented employees are seeking the decertification of the labor organization. El Monte requires legal advice as to its legal rights under the National Labor Relations Act but, because of its heavy reliance on the Medi-Cal program and the prohibitions of AB 1889, cannot obtain such advice. It likewise has a need to communicate with its employees and has a need to utilize supervisors and other management personnel and may need to create and distribute print or other materials for this purpose. However, El Monte may be unable to participate in any of these protected activities. If it could take any of these actions, El Monte will be required to expend significant financial resources to attempt to comply with the provisions of AB 1889 and its certification and reporting requirements.

24. Del Rio is the holder of a valid license issued by the DHS to operate two facilities known as Del Rio Convalescent, a 99 bed SNF in Bell Gardens, California and Del Rio Gardens Care Center ("Del Rio Gardens"), and 84 bed SNF also located in Bell Gardens. Both facilities participate in the Medi-Cal program and are heavily dependent on their continued participation in the program. They have faced, are currently facing and/or will likely face union organizing and/or decertification activities. As a result of AB 1889, these plaintiffs' constitutional and statutory rights are presently being chilled, impaired and impermissibly interfered with. Further,

attempts at compliance with AB 1889 will require significant expenditures.

25. Beverly Health and Rehabilitation Services, Inc. is the holder of a valid license issued by the DHS to operate the 76 bed SNF known as Beverly Manor in Costa Mesa, California ("Beverly Manor"). It has faced, is currently facing and/or will likely face union organizing and/or decertification activities. As a result of AB 1889, this plaintiff's constitutional and statutory rights are presently being chilled, impaired and impermissibly interfered with. Further, attempts at compliance with AB 1889 will require significant expenditures.

26. The Internext Group ("Internext") holds valid licenses issued by the DHS to operate two facilities know as Lutheran Health Facility, a 50 bed SNF in Alhambra, California ("Lutheran") and Villa Gardens Health Care Unit, a 54 bed SNF in Pasadena, California ("Villa Gardens"). Both facilities participate in the Medi-Cal program and are heavily dependent on their continued participation in the program. Based on recent union organizing activity over the last 15 to 18 months at both Lutheran and Villa Gardens, both facilities expect to make expenditures subject to the prohibitions of AB 1889. As a result of AB 1889, these plaintiffs' constitutional and statutory rights are presently being chilled, impaired and impermissibly interfered with. Further, attempts at compliance with AB 1889 will require significant expenditures. The Attorney General is charged under AB 1889 with administering and enforcing its provisions.

27. The DHS is the single state agency designated by the State of California for the purpose

of administering the Medi-Cal program. The Medi-Cal program is a joint state-federal program established by the federal government to provide health services, including long term care services to poor and needy individuals who qualify under certain state and federal requirements. DHS implements the federal certification requirements set forth in 42 U.S.C. Section 1395 *et seq.* and 42 C. F. R. Sections 483.1 *et seq.* (1991) in order to determine whether health facilities qualify for participation in the Medi-Cal program based upon the quality of care provided to their residents. It also evaluates whether facilities qualify for licensure under state quality of care requirements. It also establishes facility reimbursement for the purposes of the Medi-Cal program through specifying cost reporting, rate setting and auditing methodologies.

28. Frank G. Vanacore is the Chief of the Audit Review and Analysis Section of the DHS and is responsible for sending and processing certification forms for compliance with the provisions of AB 1889 and recommending that facilities be terminated from the Medi-Cal program based upon their failure to comply with the certification requirement set forth in AB 1889.

29. Diana M. Bontá, R.N., Dr., P.H. is the Director of the California Department of Health Services, the responsible state official for the activities of the DHS. Any decision to terminate a health facility from the Medi-Cal program would be made and carried out by and under the authority of the Director.

30. Plaintiffs are unaware of the names or identities of Does I through 10.

IV. FACTS

31. AB 1889 is the successor to remarkably similar legislation (AB 442) which was passed by the Legislature but vetoed by the Governor in 1999, who cited as his reasons for vetoing AB 442:

> This legislation has the potential to impose an unreasonable burden on businesses in that they would have to maintain minutely-detailed records to track goods, services and funds received from the State in order to avoid violating the provisions contained therein. In addition, in the absence of a verified complaint, it would be extremely difficult, if not impossible, to determine the accuracy and truthfulness of any report or fund utilization submitted by an employer.
>
> Finally, AB 442 also has the potential to significantly increase employers' litigation costs by providing countless opportunities for disgruntled employees to file civil actions merely in an effort to harass employers.
>
> Governor Gray Davis September 28, 1999 veto letter to California Assembly. (A true and correct copy is attached hereto as Exhibit B.)

32. The Governor signed AB 1889 into law on September 28, 2000.

33. Under AB 1889, State contractors and recipients of State funds are prohibited from incurring costs "to assist, promote, or deter union organizing", unless they establish costly accounting procedures to attempt to document the segregation of funds so that no State funds contribute to the

prohibited activity. Cal. Govt. Code § 16645.1(a) and (b), 16645.2(a) and (b). Moreover, State contractors are required to provide proof of such accounting upon request by the Attorney General. See id. Violators are assessed treble damages—the amount allegedly improperly expended, plus a civil penalty of double that amount. *See* Cal. Gov't Code §§ 16645.1(c), 16645.2(d). Furthermore, State contractors may not assist, promote, or deter union organizing by employees who are performing work on a service contract for the State or State agency, regardless of whether the employer does so with other sources. *See* Cal. Gov't Code § 16645.3(a). Penalties are assessed at $1,000 per employee per violation. An employer who conducts business on State property pursuant to a contract or lease may not use that property to hold a meeting with any employees or supervisors if the purpose is to assist, promote, or deter union organizing. *See* Cal. Gov't Code § 16645.5(a). Violators are assessed a civil penalty of $1,000 per employee per meeting. *See* Cal. Gov't Code § 16645.5(b). AB 1889 further prohibits "legal and consulting fees and salaries of supervisors and employees, incurred for research for, or preparation, planning, or coordination of, or carrying out, an activity to assist, promote, or deter union organizing." *See* Cal. Gov't Code § 16645.6(a). AB 1889 further prohibits private employers which receive in excess of $50,000 pursuant to state contracts and $10,000 pursuant to state programs from using state funds to assist, promote, or deter union organizing. Cal. Gov't Code § 16645.4 and 16645.7. Public employers which receive state funds are also prohibited from using state funds to assist, promote or deter unionization, and public officials who knowingly authorize an

expenditure which violates that prohibition are personally liable for the expenditures. Cal. Gov't Code § 16646.6. However, AB 1889 does not prohibit activities performed, or expenses incurred, in connection with addressing a grievance or negotiating or administering a collective bargaining agreement. Cal. Gov't Code § 16647. None of these provisions address the quality or manner of providing services. Rather, they restrict employers' expenditures, and therefore any activity, to engage in even non-coercive speech, thus, requiring employer neutrality toward unionization and to forfeit rights they have under Federal law.

34. In marked contrast, AB 1889 explicitly allows an employer to allow unions access to the employer's facilities, including those leased from the State; and it specifically permits an employer to voluntarily enter into an agreement with a union recognizing the union as the exclusive representative of its employees. *See* Cal. Gov't Code § 16647.

35. Beginning March 1, 2002, the DHS Services Audit Division began sending out a letter requiri g that SNFs and ICFs certify that they will comply with AB 1889, specifically with California Government Code Section 16645.7, or forfeit their right to participate in, and receive funds from, the Medi-Cal program. Recipients of this letter were given only forty-five days from the letter's date, February 28, 2002, or until April 15, 2002, to respond. (A true and correct copy of this letter is attached hereto as Exhibit C.) On March 15, 2002, the DHS subsequently sent the identical letters and certification demands to ICF-DDs participating in the Medi-Cal program. (A true and correct copy of the

letter is attached hereto as Exhibit D.) Based upon statements made by defendant Vanacore and other authorized DHS representatives, plaintiffs are informed and, therefore, believe that identical letters and certification demands will be sent to acute care hospitals participating in the Medi-Cal program.

V. CLAIM FOR DECLARATORY AND INJUNCTIVE RELIEF

36. AB 1889 is unconstitutional under both the United States and California Constitutions in the following particulars:

a. AB 1889 violates the Fourteenth Amendment to the United States Constitution which protects the freedom of speech guarantees found in the First Amendment to the United States Constitution and Article I, Section 2(a) of the California Constitution in ways that include, but are not limited to: (1) engaging in content based discrimination by allowing State funds and State property to be used for expression and other activities to promote unionization (by unions and by employers complicit in extending recognition to unions without employee free choice elections), while repressing expression by employers concerning the merits of unionization; (2) requiring State contractors, grantees of State funds, State program participants and lessees of State property to relinquish their freedom of speech rights as a

condition of entering into State service contracts, receiving State monies, participating in State programs and leasing State land; (3) prohibiting public employers and public officials from exercising their constitutional rights to engage in non-neutral speech concerning unionization; (4) exacting a penalty for the exercise of constitutional rights; (5) placing economic and administrative burdens on those who exercise constitutional rights by requiring expensive and onerous record keeping requirements so as to show that constitutionally protected activities were not funded by State funds; (6) being so vague as to chill the exercise of protected free speech rights; and (7) imposing a prior content based restraint on constitutionally protected expressions.

b. AB 1889 violates the Equal Protection Clause guarantees of the Fourteenth Amendment of the United States Constitution and Article I, Section 7(a) of the California Constitution in ways that include, but are not limited to: (1) favoring unions wishing to advance their cause with employees while requiring State contractors, grantees, program participants, public employers, public officials and lessees questioning unionization to remain silent and forego free speech and NLRA rights during union organizing drives and elections; (2) favoring employers who recognize

unions without elections over employers who do not; (3) treating differently all California employers who lease, contract with, or receive money from the State than those employers who do not fit within those categories, thus allowing one group constitutional and NLRA rights, while denying the other group theirs; and (4) denying State contractors, fund recipients, program participants, public employers, public officials and lessees• the right to consult with and be represented by legal counsel.

c. AB 1889 violates the Due Process Clause guarantees of the Fourteenth Amendment of the United States Constitution and Article I, Section 7(a) of the California Constitution in ways that include, but are not limited to denying State contractors, fund recipients, program participants and lessees the, right to consult with and be represented by legal counsel.

37. AB 1889 is preempted by the NLRA, including preemption under 8(c) of the NLRA which states, "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit." 29 U.S.C. Section 158(c). AB 1889 is preempted under 8(c) of the NLRA pursuant to the *Garmon* preemption under *San Diego*

Bldg. Trades Council v. Garmon, 359 U.S. 236, 79 S. Ct. 773, L. Ed. 2d 775 (1959), in that AB 1889 purports to frustrate or prohibit conduct permitted and rights guaranteed to employers under the NLRA. AB 1889 is also preempted under the NLRA pursuant to the *Machinists* preemption under *International Association of Machinists and Aerospace Workers v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 96 S. Ct. 2548, 49 L. Ed. 2d 396 (1976), in that it purports to regulate areas Congress intentionally left to be controlled by the free play of economic forces.

38. AB 1889 is preempted by the LMRDA, which comprehensively regulates the reports that employers, labor relations consultants, labor organizations, and officers and employees of labor organizations must make to the public regarding labor relations issues. The LMRDA expressly exempts employers from the very record keeping and reporting obligations which are required under AB 1889.

39. AB 1889 is preempted by the Medicare Act and the Medicaid Act, which regulates provider cost reporting and reimbursement, and so comprehensively occupies the field with its complex regulatory system demonstrating that Congress left no room for the states to supplement it. AB 1889 violates the provisions of the State Plan, Medicaid Act and the Medicare Act by: (a) prohibiting facilities from spending monies for specified purposes when the State Plan allows facilities to report certain costs for the same purposes in establishing Medi-Cal reimbursement rates and (b) making the Office of the Attorney General responsible for its administration and enforcement when the DHS is the single state

agency designated for the administration of the Medi-Cal program.

40. Without a declaratory judgment and an injunction enjoining enforcement of AB 1889, Plaintiffs and their members will be deprived of the rights sought to be enforced by this Complaint.

41. Plaintiffs have no adequate remedy at law as to the matters for which they seek an injunction and are now enduring, and in the future will endure.

WHEREFORE, Plaintiffs hereby request that the Court enter a judgment:

a. Declaring that:

(i) AB 1889 is unconstitutional under the United States Constitution and the California Constitution;

(ii) AB 1889 is preempted by the NLRA, the LMRDA, and the Medicare Act;

(iii) AB 1889 is unenforceable by any party, including, but not limited to the State of California and its subdivisions, the California Department of Health Services, the Attorney General of California, and private citizens as taxpayers.

b. Temporarily, preliminarily and permanently enjoining the State of California and all of its subdivisions and the Attorney General and all others acting in concert with them, and each of them, from:

(i) enforcing any of the provisions of AB 1889;

(ii) requiring Medi-Cal providers to

certify that they will comply with the provisions of AB 1889; and

(iii) terminating a Medi-Cal providers from the Medi-Cal program based upon failure to comply with the certification requirement or any other portion of AB 1889.

c. Granting such further relief to Plaintiffs as may be just and proper under the circumstances.

Dated: April 10, 2002

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

Case No. SA CV02377 GLT (ANx)

The Chamber of Commerce of the United States, California Chamber of Commerce, Employers Group, California Manufacturers and Technology Association, California Association of Health Facilities, California Association of Homes & Services for the Aging, California Health Association, Bettec Corporation, Marksherm Corporation, Zilaco, Inc., Zilaco, Del Rio Healthcare, Inc., Beverly Health & Rehabilitation Services, Inc. dba Beverly Manor – Costa Mesa, Internext Group,

Plaintiffs,

v.

Bill Lockyer in his capacity as Attorney General of the State of California, The Department of Health Services, Frank G. Vanacore as the Chief of the Audit Review and Analysis Section of the California Department of Health Services, and Diana M. Bontá, R.N., Dr., P.H. as the Director of the California Department of Health Services and Does 1 through 10,

Defendants.

DECLARATION OF NANCY ARMENTROUT IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

I, Nancy Armentrout, declare and state as follows:

1. I am the Director of Legislative Affairs for the California Association of Health Facilities ("CAHF"), a non-profit association representing long-term care providers in California. I have personal knowledge of the facts recited herein, and if called to testify concerning them under oath. I could and would competently testify thereto.

2. More specifically, CAHF is an association representing approximately 1,600 licensed skilled nursing facilities ("SNFs"), intermediate care facilities ("ICFs") and intermediate care for the developmentally disabled facilities ("ICF-DDs") in the State of California (collectively, "long-term care facilities"). While CAHF represents member organizations that are organized as both "for profit" and "not for profit" entities, the majority of its membership operates long-term care facilities organized as "for profit" entities. CAHF members employ approximately 72,000 employees.

3. CAHF exists to advocate on behalf of its member long-term care facilities before all relevant governmental bodies, including the executive, legislative and judicial branches of the state and federal governments in order to ensure that the interests of such facilities are advanced and not impaired in all material respects. One of the fundamental purposes of CAHF is to protect the interests of its member facilities in their role as

participants in the Medicaid program (known as Medi-Cal in California), including ensuring that governmental action involving the Medi-Cal program is consistent with the California State Medicaid Plan ("State Plan") and federal Medicaid laws and regulations. Such governmental action includes the application of federal and state requirements involving the establishment of facility reimbursement under Medi-Cal (such as cost reporting, rate setting and auditing) as well as the quality of care to be provided by facilities in order to participate in the Medi-Cal program. Another fundamental purpose of CAHF is to protect members in their roles as employers, including ensuring that the public policy defining the relations between member facilities and their employees remains consistent with the rights and privileges secured by the United States and California Constitutions, the National Labor Relations Act and other federal and state labor laws and are not compromised or violated in any manner. The specific issues raised in this Complaint and the interests underlying the issues are entirely consistent with CAHF's mission and purpose as well as the services provided to its members.

4. Not only do the vast majority of CAHF's members receive funds in excess of $10,000 through the Medi-Cal program in each calendar year (in the form of reimbursement for services provided to beneficiaries), they are also heavily dependent on the revenue provided through this program. Numerous CAHF member facilities (including SNFs, ICFs and ICF-DDs) obtain as much as 75% to 100% of their revenue through the Medi-Cal program.

5. More specifically, the vast majority of

CAHF's SNF and ICF members participate in the Medi-Cal program and approximately 65% of their residents are typically beneficiaries of that program. Based upon the high percentage of Medi-Cal residents typically residing at the facility, approximately 60% of the facility's revenue is also typically dependent on the Medi-Cal program.

6. Further the vast majority of CAHF's ICF-DD members participate in the Medi-Cal program, 100% of their residents are beneficiaries of that program, and 100% of their revenue is also dependent on the Medi-Cal program.

7. If CAHF's members withdrew or were terminated from the Medi-Cal program, they would not be able to survive financially for anything more than a brief period of time. If closed, members would be required to transfer all of their dependent residents. In addition, after withdrawing from the Medi-Cal program, these facilities would also be required, up to the point of closure, to continue to provide carefree of charge to existing Medi-Cal beneficiaries residing at the facility as well as all SNF and ICF residents eligible for the Medi-Cal program once they formally enrolled in the program.

8. Based upon information received by CAHF from its members, the restrictions on the use of such funds by AB 1889 has had and will continue to have dramatic effects on member facilities' abilities to exercise their protected Constitutional and statutory rights. For example, some of these member facilities have experienced, are experiencing and will likely experience organizing activities of labor organizations which have led or may lead to a union representation election. Others have

experienced, are experiencing and will likely experience activity undertaken by employees represented by a labor organization to decertify the union which has led to or may lead to an election.

9. Facilities faced with either of the above situations regularly pay legal counsel or other professional consultants to advise these employers of their legal rights under the National Labor Relations Act and to assist them with union organizing drives and election campaigns in an effort to inform employees of the potential drawbacks of membership in a labor organization and benefits of maintaining or regaining a direct relationship with management. Some of these employers pay their supervisory and management employees to assist in communicating to employees the potential drawbacks of membership in a labor organization and the benefits of maintaining or regarding a direct relationship with management.

10. On or about February 28, 2002, DHS sent via mail to CAHF's members operating SNFs and ICFs demanding that they certify in writing Within 45 days that they would comply with the provisions of AB 1889, a law requiring that no state funds be spent on activities which are deemed to "assist, promote or deter union organizing activity." (A true and correct copy of this certification form is attached as Exhibit 1.) That form required that SNFs and ICFs certify that "no California State Funds received for this employer's participation in a DHS program will be used to assist, promote or deter union organizing." DHS indicated in this demand that the failure to complete and return the form "may result in the removal of the facility from the Medi-Cal

program."

11. On or about March 15, 2002, DHS sent via mail to CAHF's members operating ICF-DDs demanding that they certify in writing within 45 days that they would comply with the provisions of AB 1889. (A true and correct copy of this certification form is attached as Exhibit 2.) That form required that ICF-DDs certify that "no California State Funds received for this employer's participation in a DHS program will be used to assist, promote or deter union organizing." DHS indicated in this demand that the failure to complete and return the form "may result in the removal of the facility from the Medi-Cal program."

12. CAHF members took a variety of steps in response to these demands. Some returned the form with the certification required along with a statement that: "I am certifying to the matters stated above under severe duress (i.e., threat of termination from the Medi-Cal program) and despite my belief that the requirements of AB 1889 (Government Code~ § 16645-16649) are extremely burdensome, if not impossible, to comply with and that they violate my rights under federal and state law, as well as the United States and California Constitutions. I therefore submit this certification under protest and hereby reserve my rights to challenge the legality and/or applicability of Government Code § 16645-16649." Others did not return the form and others would only certify that: "The requirements that this Certification be filed is subject to the lawsuit, The Chamber of Commerce of the United States, et al. v. Bill Lockyer, et al., which bears number SAC V02-377 DOC (ANx), in the United States District Court

for the Central District of California (filed April Il, 2002). If appropriate, a further filing will be made when the decision in that case becomes final."

13. Based upon facilities' dependence on continued participation in the Medi-Cal program to survive, most had no option but to return the certification form under protest. In deciding whether to return the form, they had to weigh the financial survival of the facility and well-being of their residents against being deprived of their protections under the United States Constitution and federal labor laws to engage in non-threatening and non-coercive speech and activities in response to union organizing activities. Most chose financial survival. However, some nevertheless refused to provide certification in the form proposed by DHS.

14. On or about April 26, 2002, DHS began sending follow-up demands to those SNFs and ICFs which it alleged had not provided completed certification forms. This demand further stated the "[failure to reform the completed certification to the Department within 15 days from the date of this letter may result in the Department's removal from the program...until the certification is completed and filed." (A true and correct copy of this follow-up demand is attached hereto as Exhibit 3.)

15. Based upon communications that I have had with the Audits Section of the DHS, I understand that such follow-up letters will also be forthcoming to ICF-DDs which DHS alleges have not been completed and returned.

16. It is unclear how many members of CAT-IF will ultimately not return the completed DHS certification form. However, DHS Chief Legal

Counsel, Barbara Yonemura, stated to me that DHS will terminate non-compliant providers from the Medi-Cal program.

17. Based upon the substantial percentage of revenue received by the facilities from the Medi-Cal program, unless they have significant access to non-state funds, they are largely unable to afford to pay for any of the activities deemed to be prohibited by AB 1889 from non-state funds. As a result, they are effectively prohibited from exercising their rights to speak and act freely under the United States Constitution and federal labor laws.

18. For those providers which could afford to spend any resources on these "prohibited activities," they would nevertheless need to comply with the accounting and record-keeping requirements of AB 1889. In doing so, facilities and companies (whether small or large) would have to fundamentally and substantially alter their financial accounting and record-keeping practices and procedures. Once again, the burdens and costs associated with such a change would likely be so extreme that it would be neither affordable nor workable.

19. For example, even for multi-state providers, state funds from any number of states are typically swept from local bank accounts into centralized clearing accounts, from which outside attorneys and consultants and employee salaries are paid. Under these circumstances, in order to comply with AB 1889, such providers would have to separately account for Medi-Cal monies from all other revenues (i.e., Medicare, HMO, insurers and private payment from individuals) within local bank

accounts in California as well as within centralized company accounts. Further, it may not even be possible for providers to fully comply with AB 1889 under these circumstances, particularly with respect to the payment of employee salaries and benefits, when they cannot tell - or ultimately control - if or when any employee may decide to engage in "prohibited activities" of which they are unaware.

20. The funds that CAHF's members receive from the Medi-Cal program provide reimbursement for services already provided to their frail and dependent residents.

21. CAHF members have been the subject of enforcement efforts under AB 1889 by both the Service Employee International Union ("SEIU") and the Attorney General's office. On May 18, 2001, Attorney General Bill Lockyer sent an accounting demand to AB Crispino and Company, Inc. demanding that AB Crispino and Company, Inc. provide records to show that it was in compliance with AB 1889. (A true and correct copy of the demand is attached as Exhibit 4 hereto.) On May 23, 2001, the SEIU filed an action in Los Angeles County Superior Court against AB Crispino and Company, Inc. seeking to enforce the provisions of AB 1889 over approximately $900 in expenditures. (A true and correct copy of the complaint is attached as Exhibit 5 hereto.) After settling the dispute over the $900 expenditures, the SEIU demanded approximately $27,000 in legal fees. Ultimately, that issue was settled for $13,000.

22. On May 18, 2001, Attorney General Bill Lockyer sent an accounting demand to Fountain View, Inc. demanding that Fountain View, Inc.

provide records to show that it was in compliance with AB 1889. (A true and correct copy of the demand is attached as Exhibit 6 hereto.) Attorney General Lockyer subsequently filed an action against Fountain View, Inc. in Los Angeles County Superior Court, which seeks the enforcement of AB 1889 through compelling the member to produce financial and accounting records demonstrating that the expenditures associated with alleged "prohibited activities" under AB 1889 were paid for with non-state funds. (A true and correct copy of the Complaint is attached as Exhibit 7 hereto.) That action is still pending.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed this 22 day of May, 2002, at Sacramento, California.

/s/

Nancy Armentrout

May 18, 2001

AB Crispino and Company, Inc.
d/b/a Santa Monica Convalescent Centers
2250 29th Street
Santa Monica, CA 90405

RE: Government Code section 16645.7

Dear Sirs and Mesdames:

California Government Code Section 16645.7, effective January 1, 2001, provides that a private employer receiving state funds in excess of $10,000 per calendar year on account of its participating in a state program "shall not use any of those funds to assist, promote, or deter union organizing." Section 16645.7, subdivision (c) provides that any private employer subject to this statute who makes expenditures to assist, promote, or deter union organizing must maintain records sufficient to show that no state funds were used for these expenditures. The Attorney General of California is charged with enforcement of the provisions of this statute and any employer subject to this law must provide these records to the Attorney General upon request.

The Santa Monica Convalescent Centers receive over $10,000 per calendar year as a result of their participation in the state's Medi-Cal program. This office has received a written notice pursuant to Government Code section 16645.8, subdivision (b) alleging that, within the past several months, these care facilities have made expenditures to deter union organizing.

Specifically, it is alleged that on February 14,

2001 employees at these care facilities were given a memorandum from Arthur Crispino intended to influence their decision whether to join a union. In addition, it appears that, during the month of February 2001, employees at these facilities were required to attend meetings on this subject conducted by Mr. Crispino, Ester Cuellar, Octavio Trejo, and other supervisory personnel and that, subsequent to these group meetings, supervisory personnel initiated further meetings and discussions with individual employees.

On this basis, it appears that AB Crispino and Company made expenditures to deter union organizing within the meaning of section 16645.7 after January 1, 2001. These expenditures would appear to include, but not be limited to:

-- Any and all fees and expenses paid to consultants for advice on influencing employees' decision whether or not to join a labor union;

-- The salaries of Mr. Crispino, Ms. Cuellar, Mr. Trejo and of any and all other supervisory personnel during times spent in attending the meetings described above, as well as times spent in preparation, planning, and coordination of these meetings;

-- The salaries of any and all employees of the Santa Monica Convalescent Care Centers who received compensation for time spent attending such meeting; and

-- Any costs of printing, duplicating, mailing, or distribution of any documents given to Santa Monica employees at any such meetings.

Please, therefore, provide no later than June 4, 2001, "records sufficient to that no state funds were

used" for these expenditures. In particular, please provide records sufficient to show the source of funding for these expenditures and sufficient to show that the Medi-Cal program did not reimburse AB Crispino and Company for any time spent by Mr. Crispino or any other employee attending or planning for these meetings.

Thank you for your prompt attention to this matter. I look forward to receiving your response.

Sincerely,

/s/
THOMAS P. REILLY
Deputy Attorney General

For BILL LOCKYER
Attorney General

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA COUNTY OF LOS ANGELES

WEST DISTRICT

NO. SC 066413

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 399, AND SHARIE HAILEY,

Plaintiffs,

v.

AB CRISPINO & COMPANY, INC. d/b/a/ SANTA MONICA CONVALESCENT CENTERS,

Defendants

COMPLAINT FOR CIVIL PENALTIES, DAMAGES, RESTITUTION, AND INJUNCTIVE AND OTHER RELIEF

1. This is an action against defendant AB CRISPINO & COMPANY, INC. which unlawfully has used State funds to deter union organizing by its employees, and unlawfully has failed to maintain records sufficient to show that State funds were not so misused. Defendants activities violate Government Code § 16645.7 and also constitute unfair and unlawful business practices under Business and Professions Code § 17200 *et seq.* Plaintiffs bring this action on their own behalf (and in the case of SEIU LOCAL 399. on behalf of its members), on behalf of the people of the State of California, and in the interest of the general public, to remedy and halt Defendant's misuse of State funds

2. Plaintiff SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 399 ("SEIU LOCAL 399") is an unincorporated labor organization, headquartered in Los Angeles. California, whose members are employed in hospitals, nursing homes, and other health care facilities throughout Los Angeles County. Among SEIU LOCAL 399's purposes is advocacy on behalf of the economic, social, and other interests of its members and those persons it seeks to organize. Both SEIU LOCAL 399 and its members pay State taxes. SEIU LOCAL 399 brings this action on its own behalf, on behalf of its members, on behalf of the people of the State of California pursuant to Government Code § 16645.8, and in the interest of the general public pursuant to Business and Professions Code § 17204.

3. Plaintiff SHARIE HAILEY ("HAILEY") is a member of the Executive Board of SEIU LOCAL 399, is a nursing home worker, and is a resident of Los Angeles, California. Halley is a State taxpayer. She brings this action on her own behalf, on behalf of the people of the State of California pursuant to Government Code § 16645.8, and in the interest of the general public pursuant to Business and Professions Code § 17204.

4. Defendant AR CRISPINO & COMPANY, INC. (hereinafter "CRISPINO") is a California corporation operating skilled nursing facilities with its headquarters in Santa Monica, California. Plaintiffs are informed and believe, and on that basis allege, that CRISPINO owns and operates two jointly-managed skilled nursing facilities called the Santa Monica Convalescent Centers, which are located at 2828 West Pice Blvd., Santa Monica, CA

90405, and at 2250 29th Street, Santa Monica, CA 90405.

5. This Court has jurisdiction over all causes of action herein pursuant to the California Constitution, Article VI § 10, because this case is a cause not given by statute to other trial courts.

6. Venue for this action properly lies in the Superior Court of the State of California in and for Los Angeles County. SEIU LOCAL 399 is headquartered in Los Angeles County HAILEY resides in Los Angeles County. Defendant is headquartered and has its principal place of business in Los Angeles County. Some or all of the actions alleged herein occurred within Los Angeles County.

7. Plaintiffs provided 60 days advance notice to the Attorney General before bringing this lawsuit, pursuant to California Government Code § 16645.8.

FIRST CAUSE OF ACTION FOR ILLEGALLY USING STATE FUNDS TO ASSIST, PROMOTE, OR DETER UNION ORGANIZING (Government Code § 16645.7(a))

8. The allegations of paragraphs 1 to 7 are realleged and incorporated herein by reference.

9. Defendant is a private business or organization that operates the Santa Monica Convalescent Centers, located at 2828 West Pico Blvd., Santa Monica, CA 90405, and at 2250 29th Street, Santa Monica, CA 90405, collectively referred to as the "CENTERS." Defendant employs more than one person in California.

10. The CENTERS are participants in the State Medi-Cal program. The CENTERS receive a

majority of their total annual income from the State Medi-Cal program.

11. Since January 1, 2001, Defendant has received in excess of $10,000 in money drawn from the State Treasury and/or a special or trust fund of the State on account of Defendant's participation in the State's Medi-Cal program. Plaintiffs are informed and believe and on that basis allege, that Defendant will receive in excess of $10,000 in money drawn from the State Treasury and/or a special or trust fund of the State in each subsequent calendar year in which Defendant continues to own the CENTERS.

12. Beginning in or about February 2001, Defendant made expenditures to deter union organizing by SEIU LOCAL 399 of employees of the CENTERS. Plaintiffs are informed and believe, and on that basis allege, that these expenditures included legal fees, consulting fees, and/or salaries of supervisors and/or employees, incurred to research. prepare, plan, coordinate. and/or carry our a campaign to influence the decisions of the CENTERS' employees about whether to support SEIU LOCAL 399.

13. Plaintiffs are informed and believe, and on that basis allege, that some or all of the expenditures to deter union organizing described in the preceding paragraph were made in whole or in part with money drawn from the State Treasury and/or a special at trust fund of the State and received by CRISPINO on account of its participation in the State's Medi-Cal program.

14. Defendant's acts alleged herein violate Government Code § 16645.7(a).

15. Plaintiffs are informed and believe, and on that basis allege, that CRISPINO co-mingled State funds and non-State funds in common accounts, and used co-mingled State funds for the expenditures to deter union organizing alleged herein, in violation of Government Code § 16645.7(a) and 16646.

16. Plaintiffs are informed and believe, and on that basis allege, that Defendant will, unless enjoined, continue to engage in the illegal acts complained of herein.

SECOND CAUSE OF ACTION FOR FAILURE TO MAINTAIN RECORDS SUFFICIENT TO SHOW THAT NO STATE FUNDS WERE USED TO ASSIST, PROMOTE OR DETER UNION ORGANIZING
(Government Code § 16645.7(c))

17. The allegations of paragraphs 1 to 16 are realleged and incorporated herein by reference.

18. Plaintiffs are informed and believe, and on that basis allege, that, since February 2001, Defendant failed to maintain records sufficient to show that it has used no State funds to assist, promote, or deter union organizing.

19. Defendant's acts alleged heroin violate Government Code § 16645.7(c).

20. Plaintiffs are informed and believe, and on that basis allege, that Defendant will, unless enjoined, continue to engage in the illegal acts complained of herein.

THIRD CAUSE OF ACTION FOR UNFAIR AND UNLAWFUL BUSINESS PRACTICES (Business & Professions Code § 17200 *et seq.*)

21. The allegations of paragraphs 1 to 20 are realleged and incorporated herein by reference.

22. California Business and Professions Code § 17200 provides that unfair competition shall mean and include any "unlawful [or] unfair . . . business act or practice."

23. As alleged above, Defendant, in the course of doing business, has violated Government Code § 16645.7(a) by using money drawn from the State Treasury and/or a special or trust fund of the State to assist, promote, deter union organizing.

24. Defendant's actions alleged herein constitute *per se* unlawful business practices in violation of California Business & Professions Code § 17200 *et seq.*

25. Plaintiffs are informed and believe, and on that basis allege, that Defendant will, unless, enjoined, continue to engage in the unlawful business practices complained of herein.

FOURTH CAUSE OF ACTION FOR UNFAIR AND UNLAWFUL BUSINESS PRACTICES (Business & Professions Code § 17200 *et seq.*)

26. The allegations of paragraphs 1 to 25 are realleged and incorporated herein by reference.

27. California Business and Professions Code § 17200 provides that unfair competition shall mean and include any "unlawful or unfair business act or practice."

28. As alleged above, Defendant, in the course of doing business, has violated Government Code § 16645.1(c), by failing to maintain records sufficient to show that it has used no money drawn from the State Treasury and/or a special or trust fund of the State to assist, promote, deter union organizing.

29. Defendant's actions alleged herein constitute *per se* unlawful business practices in violation of California Business & Professions Code §§ 17200 *et seq.*

30. Plaintiffs are informed and believe, and on that basis allege that Defendant will unless enjoined, continued to engage in the unlawful business practices complained of herein.

PRAYER FOR RELIEF

Wherefore, Plaintiffs pray for the following relief:

1. An injunction requiring Defendant to cease and desist from using any State funds to assist, promote, or deter union organizing;

2. An order requiring Defendant to provide an accounting of its expenditures of State funds so as to show the amount of State funds that were used to assist, promote, or deter union organizing;

3. A civil penalty payable to the State of California equal to twice the sum of all funds expended in violation of Government Code § 16645.7(a) and (c);

4. Damages payable to the State of California of all funds expended in violation, of Government Code § 16645,7(a) and (c);

5. Restitution to the State of California and all other appropriate equitable relief authorized by Business & Professions Code § 17203;

6. Reasonable attorneys' fees, investigative expenses, and costs of suit;

7. Such other and further relief as the Court deems equitable, just, and proper.

Date: May 23, 2001

By: /s/

Michael E. Wall

Attorneys for Plaintiffs

May 18, 2001

Fountain View, Inc.
d/b/a Baycrest Care Center
3750 Garnet Avenue
Torrance, CA 90503

RE: Government Code section 16645.7

Dear Sirs and Madams:

California Government Code section 16645.7, effective January 1, 2001, provides that a private employer receiving state funds in excess of $10,000 per calendar year on account of its participation in a state program "shall not use any of those funds to assist, promote, or deter union organizing." Section 16645.7, subdivision (c) provides that any private employer subject to this statute who makes expenditures to assist, promote, or deter union organizing must maintain records sufficient to show that no state funds were used for those expenditures. The Attorney General of California is charged with enforcement of the provisions of this statute and any employer subject to this law must provide these records to the Attorney General upon request.

Baycrest Care Center receives over $10,000 per calendar year as a result of its participation in the state's Medi-Cal program. This office has received a written notice pursuant to Government Code section 16645.8, subdivision (b) alleging that, within the past several months, Baycrest has made substantial expenditures to deter union organizing.

Specifically, Baycrest appears to have retained the services of Russ Brown Associates to influence its

employees in deciding whether to become members of a labor organization. It also appears that David Acosta and Russell Brown conducted a series of individual and small group meetings on this subject with Baycrest employees throughout the month of March 2001 and that, at one such meeting on March 17, 2001, Baycrest employees were shown videotapes intended to discourage them from joining a union.

On this basis, it appears that Baycrest made expenditures to deter union organizing within the meaning of section 16645.7 after January 1, 2001. These expenditures would appear to include, but not be limited to:

-- Any and all fees and expenses paid to Russ Brown Associates, its employees and contractors;

-- The salaries of any and all Baycrest supervisory personnel during times spent in attending the meetings described above, as well as times spent in preparation, planning, and coordination of these meetings;

-- The salaries of any and all employees of Baycrest who received compensation for time spent attending such meetings; and

-- Any costs of printing, duplicating, mailing, or distribution of any documents given to Baycrest employees at any such meetings.

Please, therefore, provide no later than June 4, 2001, "records sufficient to show that no state funds were used" for these expenditures. In particular, please provide records sufficient to show the source of funding for these expenditures and sufficient to show that the Medi-Cal program did not reimburse Baycrest for any time spent by any Baycrest

employee attending or planning for these meetings.

Thank you for your prompt attention to this matter. I look forward to receiving your response.

Sincerely,

/s

THOMAS P. REILLY
Deputy Attorney General

For BILL LOCKYER
Attorney General

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

Case No. SA CV02377 GLT (ANX)

The Chamber of Commerce of the United States, California Chamber of Commerce Employers Group, California Healthcare Association, California Manufacturers and Technology Association, California Association of Health Facilities, California Association of Homes & Services for the Aging, Bettec Corporation, Marksherm Corporation, Zilaco, Inc., Zilaco, Del Rio Healthcare, Inc., Beverly Health & Rehabilitation Services, Inc. dba Beverly Manor – Costa Mesa, Internext Group,

Plaintiffs,

v.

Bill Lockyer in his capacity as Attorney General of the State of California, The Department of Health Services, Frank G. Vanacore as the Chief of the Audit Review and Analysis Section of the California Department of Health Services, and Diana M. Bontá, R.N., Dr., P.H. as the Director of the California Department of Health Services and Does 1 through 10,

Defendants.

DECLARATION OF RONALD S. COHEN IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

I, Ronald S. Cohen, declare and state as follows:

1. I am the Executive Director for United Cerebral Palsy ("UCP"), which is a non-profit organization operating 23 Intermediate Care Facilities for Developmentally Disabled ("ICF-DDs") throughout Los Angeles, Ventura, and Santa Barbara counties and serving the needs of developmentally disabled residents. UCP participates in the Medi-Cal program and its reimbursement is comprised of 100% of funds paid for by the state. We also operate 6 adult day care programs, 5 group homes, and service clients in 6 apartment buildings. In total, UCP serves approximately 750 clients per day using its 650 employees. Based upon our participation in the Medi-Cal program and the fact that we receive $10,000 more in each calendar year, we have been told by the Department of Health Services ("DHS") that we are subject to the requirements of AB 1889 through Government Code § 16645.7.

2. Based upon my concern about compliance with the provisions of § 16645.7, on March 28, 2002, 1 wrote to the DHS seeking clarification of certain issues. (A true and correct copy of my March 28, 2002, correspondence to the DHS is attached hereto as Exhibit 1.)

3. Sometime shortly after April 23, 2002, I received a response from the Department of Health Services to my March 28th correspondence. (A true and correct copy of the DHS response is attached hereto as Exhibit 2.)

I declare under penalty of perjury under the laws of the United Slates that the foregoing is true and correct. Executed this 21 day of May, 2002 at

Woodland Hills, California.

/s

Ronald S. Cohen

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

Case No. SA CV02377 GLT (ANX)

The Chamber of Commerce of the United States, California Chamber of Commerce Employers Group, California Healthcare Association, California Manufacturers and Technology Association, California Association of Health Facilities, California Association of Homes & Services for the Aging, Bettec Corporation, Marksherm Corporation, Zilaco, Inc., Zilaco, Del Rio Healthcare, Inc., Beverly Health & Rehabilitation Services, Inc. dba Beverly Manor – Costa Mesa, Internext Group,

Plaintiffs,

v.

Bill Lockyer in his capacity as Attorney General of the State of California, The Department of Health Services, Frank G. Vanacore as the Chief of the Audit Review and Analysis Section of the California Department of Health Services, and Diana M. Bontá, R.N., Dr., P.H. as the Director of the California Department of Health Services and Does 1 through 10,

Defendants.

DECLARATION OF STEVEN HIGHLAND IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

1. I, Steven Highland declare and state as follows:

2. I am a shareholder in Del Rio Healthcare, Inc., which owns and operates Del Rio Gardens Care Center, a 84-bed skilled nursing facility and Del Rio Convalescent Center, a 99-bed skilled nursing facility, both of which are located in Bell Gardens, California and licensed by the California Department of Health Services, I am also the licensed administrator of Del Rio Gardens. Del Rio Gardens and Del Rio Convalescent currently provide long-term care services to over 180 frail and dependent elderly and debilitated residents. I have personal knowledge of the facts recited herein, and if called upon to testify concerning them under oath, I could and would competently testify thereto.

3. Del Rio Gardens and Del Rio Convalescent participate in the Medi-Cal program, and approximately 82% of Del Rio Gardens residents are beneficiaries of Medi-Cal and 83% of Del Rio Convalescent are beneficiaries of that program. Based upon the high percentage of Medi-Cal residents typically residing at these facilities, approximately 80% of Del Rio Gardens' revenue is dependent on the Medi-Cal program and 81% of Del Rio Convalescent's is dependent on the program.

4. If Del Rio Gardens or Del Rio Convalescent withdrew or was terminated from the Medi-Cal program, they would not be able to survive financially and would likely be forced to cease operations within 1 month. If closed, they would be required to transfer all of their dependent residents. In addition, after withdrawing from the Medi-Cal

program, the facilities would also be required, up to the point of closure, to continue to provide care free of charge to existing Medi-Cal beneficiaries residing at the facilities as well as all residents eligible for the Medi-Cal program once they formally enrolled in the program.

5. In March, 2002, Del Rio Gardens and Del Rio Convalescent received demands from the DHS that they would be required to certify in writing that they will comply with the provisions of AB 1889, a law requiring that no state funds be spent on activities which are deemed to "assist, promote and deter union organizing activity." I returned the form with the certification required under protest. (True and correct copies of the forms submitted are attached as Exhibits 1 and 2.)

6. Based upon my facilities' dependence on their continued participation in the Medi-Cal. program to survive, we had no option but to return the certification form under protest In deciding whether to return the form, we had to weigh the financial survival of the facilities and well-being of our residents against being deprived of our protections under the United States Constitution and federal labor laws to engage in non-threatening and non-coercive speech and activities in response to union organizing activities. We chose financial survival.

7. In 2001, representatives from SEIU Local 399 began leafletting our employees at both Del Rio facilities for the purpose of unionizing those employees. Some SEIU representatives even attempted to enter the facilities without permission. As a result, we requested that they confine their

activities to the sidewalks outside the facilities.

8 Since that time, we have communicated with our employees at general meetings that Local 399 might be providing them with written materials and indicated that not everything, if anything, represented in those materials was true. We have also expressed to our employees the viewpoint that becoming a unionized workforce is not in their best interest. We have also discussed with our supervisors that they need to be able to answer employee questions about unionization and express our belief that it is not in the best interests of our employees.

9. Based upon the substantial percentage of revenue received by the facilities from the Medi-Cal program, we are unable to afford to pay for any of the activities deemed to be prohibited by AB 1889 from non-state funds. As a result, we are effectively prohibited from exercising our rights to speak and act freely under the United States Constitution and federal labor law.

10. If we were going to spend any resources on these "prohibited activities," we determined that in order to attempt to comply with the accounting and record-keeping requirements of AB 1889, we would have to fundamentally and substantially alter our financial accounting and record-keeping. Once again, the burden and cost associated with such a change was so extreme that we decided that we could not afford it. However, we are still fearful that it may not even be possible for us to comply with AB 1889, particularly with respect to the payment of employee salaries and benefits, when we cannot tell - or ultimately control if or when any employee may

decide to engage in "prohibited activities" of which we are unaware.

11. The funds that Del Rio Gardens and Del Rio Convalescent receive from the Medi-Cal program provide reimbursement for services already provided to our frail and dependent residents. It is not fair for the state to prohibit us from spending monies received for services provided for any lawful purpose. It is particularly unfair for such prohibitions to cause us to be unable to speak or act freely as guaranteed by the United States Constitution and federal labor laws. It is also particularly unfair to restrict our speech when unions are not restricted in that regard as well.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Dated: May 23, 2002

By: /s/

Steven Highland

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

Case No. SA CV02377 GLT (ANX)

The Chamber of Commerce of the United States, California Chamber of Commerce Employers Group, California Healthcare Association, California Manufacturers and Technology Association, California Association of Health Facilities, California Association of Homes & Services for the Aging, Bettec Corporation, Marksherm Corporation, Zilaco, Inc., Zilaco, Del Rio Healthcare, Inc., Beverly Health & Rehabilitation Services, Inc. dba Beverly Manor – Costa Mesa, Internext Group,

Plaintiffs,

v.

Bill Lockyer in his capacity as Attorney General of the State of California, The Department of Health Services, Frank G. Vanacore as the Chief of the Audit Review and Analysis Section of the California Department of Health Services, and Diana M. Bontá, R.N., Dr., P.H. as the Director of the California Department of Health Services and Does 1 through 10,

Defendants.

DECLARATION OF MORT SWALES IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

1. I, Mort Swales, declare and state as follows:

2. Through my ownership interest in Internext Group, I am the co-President of the Alhambra, a 50-bed skilled nursing facility located in Alhambra, California, and of Villa Gardens Health Care Unit ("Villa Gardens"), a 54-bed skilled nursing facility operating within a 320-resident Continuous Care Retirement Community ("CCRC") located in Pasadena, California, both of which are licensed by the California Department of Health Services. Alhambra and Villa Gardens currently provide skilled nursing services to over 100 frail and dependent elderly and debilitated residents, I have personal knowledge of the facts recited herein, and if called upon to testify concerning them under oath, I could and would competently testify thereto.

3. Alhambra and Villa Gardens participate in the Medi-Cal program. Based upon the participation of Medi-Cal residents at these facilities, a portion of Alhambra's and Villa Gardens' revenue is dependent on continued participation in the Medi-Cal program.

4. If Alhambra or Villa Gardens withdrew or was terminated from the Medi-Cal program, they would be negatively financially impacted by the loss of revenue.

5. In March 2002, Alhambra and Villa Gardens received demands from the DHS that they would be required to certify in writing that they will

comply with the provisions of AB 1889, a law requiring that no State funds be spent on activities which are deemed to "assist, promote and deter union organizing activity." I returned the form with the certification required under protest. (A true and correct copy of the form submitted by Villa Gardens is attached as Exhibit 1.)

6. Based upon my facilities' dependence on their continued participation in the Medi-Cal program to survive, we had no option but to return the certification form under protest. In deciding whether to return the form, we had to weigh the financial survival of the facilities and well-being of our residents against being deprived of our protections under the United States Constitution and federal labor laws to engage in non-threatening and non-coercive speech and activities in response to union organizing activities. We chose financial survival.

7. In 2001, representatives from SEIU Local 399 began leafletting Our employees for the purpose of unionizing the workforces at both the Alhambra and Villa Gardens facilities. While these organizing efforts have not succeeded to date, there is at least one employee at Villa Gardens who consistently expresses his opinion during working hours to other employees that the workplace should be unionized.

8. During both organizing efforts, we utilized outside consultants to train our supervisors and managers as to employer and employee rights and responsibilities under federal labor law, as well as what could be lawfully communicated to employees concerning the potential disadvantages of

unionization. We continue to train our supervisors on these issues twice a year. Department heads also meet regularly to discuss management issues and issues surrounding union organizing are typically part of such discussions.

9. Based upon the revenue received by the facilities from the Medi-Cal program, we are compromised in our ability to afford to pay for any of the activities deemed to be prohibited by AB 1889 from non-state funds. As a result, we are effectively prohibited from exercising our rights to speak and act freely under the United States Constitution and federal labor law.

10. If we were going to spend any resources on these "prohibited activities," we determined that in order to attempt to comply with the accounting and record-keeping requirements of AR 1889, we would have to fundamentally and substantially alter our financial accounting and record-keeping. Once again, the burden and cost associated with such a change was so extreme that we decided that we could not afford it. However, we are still fearful that it may not even be possible for us to comply with AR 1889, particularly with respect to the payment of employee salaries and benefits, when we cannot tell - or ultimately control - if or when any employee may decide to engage in "prohibited activities" of which we are unaware.

11. The funds that Alhambra and Villa Gardens receive from the Medi-Cal program provide reimbursement for services already provided to our frail and dependent residents. It. is not fair for the state to prohibit us front spending monies received for services provided for any lawful purpose. It is

particularly unfair for such prohibitions to cause us to be unable to speak or act freely as guaranteed by the United States Constitution and federal labor laws. It is also particularly unfair to restrict our speech when unions are not restricted in that regard as well.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

By: /s/
Mort Swales

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

Case No. SA CV02377 GLT (ANX)

The Chamber of Commerce of the United States, California Chamber of Commerce Employers Group, California Healthcare Association, California Manufacturers and Technology Association, California Association of Health Facilities, California Association of Homes & Services for the Aging, Bettec Corporation, Marksherm Corporation, Zilaco, Inc., Zilaco, Del Rio Healthcare, Inc., Beverly Health & Rehabilitation Services, Inc. dba Beverly Manor – Costa Mesa, Internext Group,

Plaintiffs,

v.

Bill Lockyer in his capacity as Attorney General of the State of California, The Department of Health Services, Frank G. Vanacore as the Chief of the Audit Review and Analysis Section of the California Department of Health Services, and Diana M. Bontá, R.N., Dr., P.H. as the Director of the California Department of Health Services and Does 1 through 10,

Defendants.

DECLARATION OF DANIEL ZILAFRO IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

1. I, Daniel Zilafro, declare and state as follows:

2. Through my ownership of Zilaco and Zilaco, Inc., I am the owner/operator of the El Monte Care Center, a 59-bed skilled nursing facility and CherryLee Lodge, a 46-bed skilled nursing facility, both of which are located in El Monte, California and licensed by the California Department of Health Services. El Monte and CherryLee currently provide long-term care services to over 100 frail and dependent elderly and debilitated residents. I have personal knowledge of the facts recited herein, and if called upon to testify concerning them under oath, I could and would competently testify thereto.

3. El Monte and CherryLee participate in the Medi-Cal program, and approximately 95% of El Monte residents are beneficiaries of Medi-Cal and 100% of CherryLee are beneficiaries of that program. Based upon the high percentage of Medi-Cal residents typically residing at these facilities, approximately 90% of El Monte's revenue is dependent on the Medi-Cal program and 100% of CherryLee's is dependent n the program.

4. If El Monte or CherryLee withdrew or was terminated from the Medi-Cal program, they would not be able to survive financially and would likely be forced to cease operations within 1 month. If closed, they would be required to transfer all of their dependent residents. In addition, after withdrawing from the Medi-Cal program, the facilities would also be required, up to the point of closure, to continue to provide care free of charge to existing Medi-Cal beneficiaries residing at the facilities as well as all residents eligible for the Medi-

Cal program once they formally enrolled in the program.

5. In March 2002, El Monte and CherryLee received demands from the DHS that they would be required to certify in writing that they will comply with the provisions of AB 1889, a law requiring that no state funds be spent on activities which are deemed to "assist, promote and deter union organizing activity." I returned the form with the certification required under protest. (True and correct copies of the forms submitted are attached as Exhibits I and 2.)

6. Based upon my facilities' dependence on their continued participation in the Medi-Cal program to survive, we had no option but to return the certification form under protest. In deciding whether to return the form, we had to weigh the financial survival of the facilities and well-being of our residents against being deprived of our protections under the United States Constitution and federal labor laws to engage in non-threatening and non-coercive speech and activities in response to union organizing activities. We chose financial survival.

7. Both El Monte and CherryLee have had extensive union organizing and related activity since January 2000. In October 2000, SEIU Local 399 became the recognized bargaining agent for certain employees at El Monte and CherryLee. However, to date, neither facility has reached agreement with Local 399 on the terms of a collective bargaining agreement. Based upon past activities and anticipated future activities in light of the on-going negotiations, we expect that there will be activity

undertaken by such employees in the very near future which will implicate AB 1889.

8. Based upon the substantial percentage of revenue received by the facilities from the Medi-Cal program, we are unable to afford to pay for any of the activities deemed to be prohibited by AB 1889 from non-state funds. As a result, we are effectively prohibited from exercising our rights to speak and act freely under the United States Constitution and federal labor law.

9. If we were going to spend any resources on these "prohibited activities," we determined that in order to attempt to comply with the accounting and record-keeping requirements of AB 1889, we would have to fundamentally and substantially alter our financial accounting and record-keeping. Once again, the burden and cost associated with such a change was so extreme that we decided that we could not afford it. However, we are still fearful that it may not even be possible for us to comply with AB 1889, particularly with respect to the payment of employee salaries and benefits, when we cannot tell - or ultimately control - if or when any employee may decide to engage in "prohibited activities" of which we are unaware.

10. The funds that El Monte and CherryLee receive from the Medi-Cal program provide reimbursement for services already provided to our frail and dependent residents. It is not fair for the state to prohibit us from spending monies received for services provided for any lawful purpose. It is particularly unfair for such prohibitions to cause us to be unable to speak or act freely as guaranteed by the United States Constitution and federal labor laws.

it is also particularly unfair to restrict our speech when unions are not restricted in that regard as well.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

By: /s

Daniel Zilafro

March 22, 2001

Hon. William Lockyer, Esq.
Attorney General
State of California
California Department of Justice
1300 I Street, 11th Floor
Sacramento, CA 95814

Re: AB Crispino and Company, Inc. d/b/a Santa Monica Convalescent Centers
Government Code Section 16645.8(b)
Sixty Day Notice

Dear Attorney General Lockyer:

I am writing on behalf of SEIU Local 399 to provide you with a 60-day notice pursuant to Government Code Section 16645.8(b). SEIU Local 399 believes that AB Crispino and Company, Inc. d/b/a Santa Monica Convalescent Centers (hereinafter "Santa Monica I and II") has impermissibly used state funds to "assist, promote or deter union organizing" in violation of Government Code Section 16645.7.

We request that you exercise your authority under Section 16645.7(c) to demand the production of records by Santa Monica I and 11 "sufficient to show that no state funds were used" to assist, promote or deter union organizing. If such records cannot be produced, or if the records shown that State funds were used for impermissible expenditure, we request that you commence a civil action against Santa Monica 1 and II under Section 16645.g for injunctive relief, damages, civil penalties, and other appropriate

equitable relief. In support this request SEIU Local 399 respectfully submits as follows:

AB Crispino and Company, Inc. owns two jointly managed nursing homes called the Santa Monica Convalescent Centers located at 2828 West Pico Boulevard, and 2250 29th Street, both in Santa Monica, California 90405. Santa Monica I and II are participants in the State Medi-Cal program and receive a majority of their total annual income from that program. We believe that Santa Monica I and II have already received more than $10,000 in Medi-Cal program funds this calendar year.

Starting in February, 2001, Santa Monica I and 11 began to make expenditures to assist, promote or deter union organizing. (Section 16645.7(a)) Specifically, Santa Monica I and II made expenditures to deter the organizing of its employees by SEIU Local 399. These expenditures included the fees and expenses of consultants retained to "research", "prepare", "plan", "coordinate" and "carry out" its campaign to "influence the decision of [their] employees" on whether to support SEIU) Local 399. (Sections 16645(a), 16646(a)). Santa Monica I and 11 also made expenditures for the compensated work lime of their supervisors and employees while participating in the various components of the anti-union campaign. Supervisors participated in anti-union orientation and training sessions on work time with the consultants. In addition, supervisors and employees participated in group meetings on work time for the propose of influencing the decision of workers on whether to join and support the union.

Based on information available to us, we believe that the expenses associated with these

activities were paid from accounts where California Medi-Cal funds were commingled with other funds. (Section 16646(b)). We further believe that Santa Monica I and II have failed to maintain records sufficient to show that no state funds were used for its anti-union campaign as required by Section 16645.7(c).

In demanding records from Santa Monica I and II, you should be sure to include a demand for records showing that supervisors and employees were not paid with State program funds to take part in Santa Monica I and II's anti-union campaign and that they did not participate in those activities on time paid for by the State for the care of Medi-Cal recipients.

Please feel free to contact the undersigned if you have any questions regarding this matter.

Respectfully submitted,

/s

John J. Sullivan
Associate General Counsel,
SEIU

March 22, 2001

Hon. William Lockyer, Esq.
Attorney General
State of California
California Department of Justice
1300 I Street, 11th Floor
Sacramento, CA 95814

Re: Fountain View Inc. d/b/a Baycrest Care Center Government Code Section 16645.8(b) Sixty Day Notice

Dear Attorney General Lockyer:

I am writing on behalf of SEIU Local 399 to provide you with a 60-day notice pursuant to Government Code Section 16645.8(b). SEIU Local 399 believes that Fountain View Inc. d/b/a Baycrest Care Center (hereinafter "Baycrest") has impermissibly used state funds to "assist, promote or deter union organizing" in violation of Government Code Section 16645.7.

We request that you exercise your authority under Section 1664 5.7(c) to demand the production of records by Baycrest "sufficient to show that no state funds were used" to assist, promote or deter union organizing. If such records cannot be produced, or if the records shown that State funds were used for impermissible expenditures, we request that you commence a civil action against Baycrest under Section 16645.8 for injunctive relief, damages, civil penalties, and other appropriate equitable relief. In support this request SEW Local 393 respectfully submits as follows:

Fountain View Inc. owns a nursing home called the Baycrest Care Center at 3750 Garnet Street in Torrance, California. Baycrest is a participant in the State Medi-Cal program and receives a majority of its total annual income from that program. We believe that Baycrest has already received more than $10,000 in Medi-Cal program funds this calendar year.

Starting in February, 2001, Baycrest began to make expenditures to assist, promote or deter union organizing. (Section 16645.7(a)) Specifically, Baycrest made expenditures to deter the organizing of its employees by SEIU Local 399. These expenditures included the fees and expenses of consultants hired by Baycrest to "research", "prepare", "plan", "coordinate" and "carry out" its campaign to "influence the decision of its employees" on whether to support SEIU Local 399. (Sections 16645(a), 16646(a)). Baycrest also made expenditures for the compensated work time of its supervisors and employees while participating in the various components of its anti-union campaign. Supervisors participated in anti-union orientation and training sessions on work time with the consultants. In addition, supervisors and employees participated in group meetings on work time for the propose of influencing the decision of workers on whether to join and support the union.

Based on information available to us, we believe that the expenses associated with these activities were paid from accounts where California Medi-Cal funds were commingled with other funds. (Section 16646(b)). We further believe that Baycrest has failed to maintain records sufficient to show that

no state funds were used for its anti-union campaign as required by Section 16645.7(c).

In demanding records from Baycrest, you should be sure to include a demand for records showing that supervisors and employees were not paid with State program funds to take part in Baycrest's anti-union campaign and that they did not participate in those activities on time paid for by the State for the care of Medi-Cal recipients.

Please feel free to contact the undersigned if you have any questions regarding this matter.

Respectfully submitted,

/s

John J. Sullivan
Associate General Counsel,
SEIU

March 22, 2001

Hon. William Lockyer, Esq.
Attorney General
State of California
California Department of Justice
1300 I Street, 11th Floor
Sacramento, CA 95814

Re: Summit Care California d/b/a Royalwood Care Center Government Code Section 16645.8(b) Sixty Day Notice

Dear Attorney General Lockyer:

I am writing on behalf of SEIU Local 399 to provide you with a 60-day notice pursuant to Government Code Section 16645.8(b). SEIU Local 399 believes that Summit Care California d/b/a Royalwood Care Center (hereinafter "Royalwood") has impermissibly used state funds to "assist, promote or deter union organizing" in violation of Government Code Section 16645.7.

We request that you exercise your authority under Section 16645.7(c) to demand the production of records by Royalwood "sufficient to show that no state funds were used" to assist, promote or deter union organizing. If such records cannot be produced, or if the records shown that State funds were used for impermissible expenditures, we request that you commence a civil action against Royalwood under Section 16645.8 for injunctive relief, damages, civil penalties, and other appropriate equitable relief. In

support this request SEIU Local 399 respectfully submits as follows:

Fountain View Inc. owns a nursing home called the Royalwood Care Center at 22520 Maple Avenue in Torrance, California. Royalwood is a participant in the State Medi-Cal program and receives a majority of its total annual income from that program. We believe that Royalwood has already received more than $10,000 in Medi-Cal program funds this calendar year.

Starting in February, 2001, Royalwood began to make expenditures to assist, promote or deter union organizing. (Section 16645.7(a)) Specifically, Royalwood made expenditures to deter the organizing of its employees by SEIU.) Local 399. These expenditures included the fees and expenses of consultants hired by Royalwood to "research", "prepare", "plan", "coordinate" and "carry out" its campaign to "influence the decision of its employees" on whether to support SEIU Local 399. (Sections 1664 5(a), 16646(a)). Royalwood also made expenditures for the compensated work time of its supervisors and employees while participating in the various components of its anti-union campaign. Supervisors participated in anti-union orientation and training sessions on work time with the consultants. In addition, supervisors and employees participated in group meetings on work time for the propose of influencing the decision of workers on whether to join and support the union.

Based on information available to us, we believe that the expenses associated with these activities were paid from accounts where California Medi-Cal funds were commingled with other funds.

(Section 1664 6(b)). We further believe that Royalwood has failed to maintain records sufficient to show that no state funds were used for its anti-union campaign as required by Section 16645.7(c).

In demanding records from Royalwood, you should be sure to include a demand for records showing that supervisors and employees were not paid with State program funds to take part in Royalwood's anti-union campaign and that they did not participate in those activities on time paid for by the State for the care of Medi-Cal recipients.

Please feel free to contact the undersigned if you have any questions regarding this matter.

Respectfully submitted,

/s

John J. Sullivan
Associate General Counsel,
SEIU

June 8, 2001

Hon. William Lockyer, Esq.
Attorney General
State of California
California Department of Justice
1300 I Street, 11th Floor
Sacramento, CA 95814

Re: MEK Long Beach LLC d/b/a Regency Oaks Care Center Government Code Section 16645.8(b) Sixty Day Notice

Dear Attorney General Lockyer:

I am the Associate General Counsel of the Service Employees International Union, AFL-CIO ("SEIU"), a California tax payer. I am writing on behalf of the SEIU and its members in the State of California, to provide you with a 60 day notice pursuant to Government Code Section 16645.8(b). We believe that MEK Long Beach LLC, d/b/a Regency Oaks Care Center ("Regency Oak") has impermissibly used state funds to "assist, promote or deter union organizing" in violation of Government Code Section 16645.7.

We request that you exercise your authority under Section 16645.1(c) to demand the production of records by Regency Oaks "sufficient to show that no stale funds were used" to assist, promote or deter union organizing. If such records cannot be produced, or if the records shown that State funds were used for impermissible expenditures, we request that you commence a civil action against Regency Oaks under Section 16645.8 for injunctive relief, damages, civil penalties, and other appropriate equitable relief. In

support this request SEIU and its members respectfully submit as follows:

MEK Long Beach owns and operates a nursing borne located at 3850 East Ester Street, Long Beach, California, called the Regency Oaks Care Center. Regency Oaks is a participant in the State Medi-Cal program and receives a significant portion of its total annual income from that program. We believe that Regency Oaks has already received more than $10,000 in Medi-Cal program funds this calendar year.

Starting in late February, 2001, Regency Oaks began to make expenditures to assist, promote or deter union organizing. (Section 16645.7(a)) Specifically, Regency Oaks made expenditures to deter the organizing of its employees by SEIU Local 399. These expenditures included the fees and expenses of consultants retained to "research", "prepare", "plan", "coordinate" and "carry out" its campaign to "influence the decision of [their] employees" on whether to support SEIU Local 399. (Sections 16645(a), 16646(a)). Regency Oaks retained the services of Cruz and Associates, Inc to "persuade" its employees not to support the Union.[1] Regency Oaks also made expenditures for the compensated work time of its supervisors and employees while participating in the various components of the anti-union campaign. Supervisors participated in anti-union orientation and training sessions on work time with the consultants. In addition, supervisors and

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[1] A copy of Cruz and Associates, Inc., Receipts and Disbursements Report for its anti-union persuader activities, filed with the United States Department of Labor, for calendar year 2000 is attached.

employees participated in group meetings on work time for the propose of influencing the decision of workers on whether to join and support the union.

In demanding records from Regency Oaks, you should be sure to include a demand for records showing that supervisors and employees were not paid with State program funds to take part in Regency Oak's anti-union campaign and that they did not participate in those activities on time paid for by the State for the care of Medi-Cal recipients.

Please feel free to contact the undersigned if you have any questions regarding this matter.

Respectfully submitted,

/s

John J. Sullivan
Associate General Counsel,
SEIU

California Department of Justice
Public Inquiry Unit
P.O. Box 944255
Sacramento, CA 94244-25 50

Re: M.V. Transportation, Inc.. and Teamsters Local 85 (Govt. Code §16645)

Dear Madam or Sir:

This office represents Teamsters Local 85 which recently embarked upon an organizing campaign among MV Transportation, Inc.'s San Francisco-based employees. I am contacting your office to report MV Transportation's violations of California Government Code §16645, to request that the Attorney General's office bring suit against MV Transportation pursuant to Government Code § 16645.8(a), and to give notice, pursuant to Government Code §16645.8(b), that should the Attorney General fail to initiate such action Local 85 will itself initiate civil action against MV Transportation to enforce the applicable statute.

MV Transportation, from its San Francisco facility, provides paratransit services to MediCal beneficiaries pursuant to a contract with the California Department of Health Services. As such, MV is a "state contractor" within the meaning of Govt. Code §16645(c).

Govt. Code § 16645.3 prohibits state contractors from taking any action to "deter union organizing" by its employees. Nonetheless, MV in the past few weeks has embarked upon an aggressive anti-union campaign to discourage its employees from supporting Local 85. This campaign so far has

included engaging in surveillance of employee union activity, interrogating employees about their union sentiments, and, by memo dated November 28,2001, directing employees not sign union authorization cards (a copy of the November 28 memo is enclosed).

On November 27, one manager even followed an employee to his bus and directed him not to sign an authorization card just as he had the pen in his hand. According to its November 28 memo, MV also plans to conduct several mandatory employee meetings on December 5, presumably to further the Company's efforts to "deter union organizing." Local 85 is documenting these and other violations and intends to seek full enforcement of the laws protecting the MV employees' right to organize.

Very truly yours,

/s/

Andrew H. Baker

Memo

To: San Francisco Division

From: ____

Date: 11/28/2001

Re: Unions and Labor Issues

SF Team

It has been brought to my attention that there are concerns and communication issues among drivers and staff. Some of these concerns may revolve around the condition of equipment, salary, benefits, schedules and etc. To complicate our communication process in the last few days we have had Teamster persons outside the gate. What they want is your money in the form of dues. They will say almost anything in that regard. Ask the senior drivers, their promises are hollow and in the last election the SF employees voted 74 to 10, a resounding No!

The owners of MV Transportation, _____ have been informed of the situation and will be here to address your concerns and answer your questions. This will happen at our next Safety Meeting. I ASK YOU UNTIL THEN, NOT TO SIGN TEAMSTER CARDS.

Meeting: Wednesday, December 5th, 2001

Times: 11:00 am

1:00 pm

6:00pm

Please remember, this meeting is mandatory and you must attend during one of these time periods.

My door is always open and I welcome the opportunity to speak with all of you and constructively address suggestions, ideas and concerns.

Best Regards.

March 28, 2002

Hon. William Lockyer
Attorney General
State of California
California Department of Justice
1300 I Street, 11th Floor
Sacramento, CA 95814

Re: Palomar Pomerado Health System
Misappropriation of Public Assets & Breach of Charitable Trust

Dear Attorney General Lockyer:

On behalf of the California Nurses Association (CNA), I am writing to advise you of serious and substantial misappropriations of state funds, received by Palomar Pomerado Health System ("PPHS") for public health purposes, but apparently expended for purposes expressly prohibited by Sections 16645.1, 16645.2 and/or 16645.6 of the California Government Code. CNA requests that you exercise your authority under Section 16645.7(c) to determine the production of records by PPHS "sufficient to show that no state funds were used" to assist, promote or deter union organizing. If such records cannot be produced, or if the records show that State funds were used for impermissible expenditures, we request that you commence a civil action against PPHS under Section 16645.8 for injunctive relief, damages, civil penalties, and other appropriate equitable relief. In support of this request. CNA respectfully submits the following information.

Palomar Pomerado Health System

Palomar Pomerado Health System is an integrated health care system consisting of non-profit and for-profit entities, including Palomar Medical Center, Pomerado Hospital, Villa Pomerado, Palomar Continuing Care Center, and Escondido Surgery Center. PPHS operates as a public Hospital District and as a "public agency" within the meaning of the Meyer-Milias-Brown Act ("MMBA"), Calif. Govt Code § 3501(c). PPHS facilities include Palomar Medical Center, Pomerado Hospital, skilled nursing facilities and a surgery center.

State Funding of PPHS Operations (Medi-Cal)

PHHS receives substantial and ongoing funding from the State of California, including Medi-Cal funds. The following summary reflects the significant amounts of Medi-Cal funding received by the two PPHS acute care facilities over the past few years, Palomar Medical Center and Pomerado Hospital:

Hospital Facility	Funding years	Gross Outpatient Medi-Cal Revenue	Gross Inpatient Med-Cal Revenue
Palomar Medical Center	1995-1999	$32,427,216	$179,490,914
Pomerado Hospital	1995-1999	$ 9,121,745	$ 48,081,538
TOTAL	1995-1999	$41,548,962	$227,572,442

Registered Nurses' Organization Campaign – PPHS Funding of an Anti-Union Campaign with Misappropriated Assets and Public Funds

The Registered Nurses employed by PPHS are actively engaged in an organizing campaign to win exclusive representation by the California Nurses Association, exercising rights of self. determination guaranteed by the MMBA, Govt. Code § 3502. The PPH Board and management are hostile to CNA and oppose collective action and exclusive representation by Registered Nurses. PPHS has and continues to actively interfere with nurses' exercise of statutory rights to "join and participate in an employee organization of their own choosing for the purpose of representation on all matters of employer-employee relations," protected, *inter alia*, by Govt. Code § 3502.

PPHS management is engaged in an aggressive, heavily financed campaign to defeat collective organization of PPHS Registered Nurses and their representation by the California Nurses Association. PPHS has and continues to actively interfere with nurses' exercise of statutory rights to "join and participate in an employee organization of their own choosing for the purpose of representation on all matters of employer-employee relations," protected, *inter alia*, by Gov. Code § 3502.

Because of the extent of "persuader" activity and the substantial costs of the employer campaign, it is likely that PPHS has commingled public fund received from the State of California, including Medi-Cal reimbursements, with other funds that have been expended for legal and consulting fees and salaries of PPH supervisors and employees, and on research,

preparation, planning, coordination, and carrying on activities to interfere with and deter the PPH nurses' organizing for representation by CNA. Such expenditures are expressly prohibited by state law. (Govt. Code §§ 16645.6, 16646).

The misappropriation of funds includes significant expenditures on a highly visible campaign to justify PPHS violations of recent amendments to the Meyers-Milias-Brown Act requiring MMBA employers to participate in "card check" procedures for union recognition. (See enclosed "talking points" and exemplars of an expensive PPHS anti-union web page.)

Note that a month ago, we wrote to the PPHS Board of Directors to give them an opportunity to remedy violations of law and misappropriations of assets before taking further action. We also asked for certain information necessary for determining whether the substantial PHHS assets currently being used for the anti-union campaign against CNA have been drawn from property segregated accounts, or from co-mingled accounts. (See enclosed February 11 letter from Ted Cahill to Norman Gruber.) Our request was simple and straightforward:

1 Publicly disclose all funds received by PPHS from the State of California;

2 Identify the specific disbursements of those funds, including whether any such funds are received and commingled with other funds of PPHS;

3. Report the total amount and itemization of all expenditures made to deter or influence the decisions of PPHS Registered Nurses regarding the

selection of the California Nurses Association as their exclusive collective bargaining representative; and

4. In the event state funds or commingled state and other PPHS funds have been expended for the unlawful purposes of interfering with or deterring RN organizing, immediately reimburse all such misappropriated assets.

In response, PPHS denied any improper use of state funds and then claimed our requests did not "reasonably identify" PPHS records subject to disclosure. (See enclosed February 18, 2002 letter to Ted Cahill from Norman Gruber.) Under the circumstances, we view this response as an admission that funds have been commingled and substantial sums spent unlawfully on the anti-union campaign.

Accordingly, we ask that you invoke the procedures of Govt. Code § 16645.7(c) in order to obtain records sufficient to show that PPHS has not used state funds unlawfully to support its heavily financed campaign against the nurses organizing for union representation. In the event PPHS refuses production of these records or the records do not reflect properly segregated accounts as required by law, we ask that you institute proceedings seeking appropriate equitable relief.

Thank you for your immediate attention to this flagrant abuse of workers' rights. Please call me if you have any questions.

Respectfully submitted,

/s

David M. Johnson
Southern California Director

Stationary Engineers, Local 39
INTERNATIONAL UNION OF OPERATING
ENGINEERS AFL-CIO

April 12, 2002

Mr. Bill Lockyer
Attorney General
Attn: Ralph Lightstone
Department of Justice
1300 I Street, Suite 1740
Sacramento, CA 95814

Re: Golden Sierra Job Training Agency

Dear Mr. Lightstone:

I am a Business Representative for Local Union No. 39. Among my duties are to organize Public Employee Bargaining Units. I am writing to request your office's assistance enforcing the Cedillo Neutrality In Government law.

The Union recently organized a small bargaining unit in Golden Sierra Job Training Agency. Taking advantage of newly amended Meyers-Milias-Brown Act, the Union demanded recognition on the basis of a majority of cards in appropriate units. The employer has refused to recognize the Union for approximately three months. The employer has hired an attorney to resist the Union organizing drive. The employer, Golden Sierra Job Training Agency, is a grant recipient under Gov. Code 166452 and has not complied with the record keeping requirement of 166452(c), segregating State money from general revenues. Therefore, the Golden

Sierra has violated Gov. Code § 16645.1, prohibiting use of State funds to assist, promote or deter Union organizing.

Please contact me and I will provide any additional documents or other information you request. Thank you in advance for your assistance in this matter.

Sincerely,

/s

Chuck Thiel

Business Representative

April 22, 2002

Hon. William Lockyer
Attorney General
State of California
California Department of Justice
1300 I Street, 11th Floor
Sacramento, California 95814

Re: JPH Management, Inc. d/b/a Mid-Wilshire Health Care Center Government Code Section 16645.8(b) 60-Day Notice

Dear Attorney General Lockyer:

The undersigned represents Service Employees International Union, Locals 399 and 434B, AFL-CIO (collectively, "SEIU") regarding JPH Management, Inc. d/b/a Mid-Wilshire Health Care Center ("Mid-Wilshire"). SEIU are California taxpayers.

By this letter, SEIU and their members are providing the State of California with a 60-day notice pursuant to Government Code Section 16645.8(b). We believe that Mid-Wilshire has impermissibly used state funds to "assist, promote or deter union organizing" in violation of Government Code Section 16645.7.

We request that you exercise your authority under Section 16645.7(c) to demand the production of records from Mid-Wilshire "sufficient to show that no state funds were used" to assist, promote or deter union organizing. If such records cannot be produced, or if the records show that State funds were used for

impermissible expenditures, we request that you commence a civil action against Mid-Wilshire under Section 16645.8 for injunctive relief, damages, civil penalties, and other appropriate equitable relief.

JPH Management, Inc. owns and operates a nursing home located at 676 S. Bonnie Brae Street, Los Angeles, California, called the Mid-Wilshire Health Care Center. Mid-Wilshire is a participant in the state Medi-Cal program and receives a significant portion of its total annual income from that program. We believe that Mid-Wilshire has already received more than $10,000 in MediCal programs funds this calendar year.

Starting in August, 2001, Mid-Wilshire began to make expenditures to assist, promote or deter union organizing. [Section 16645.7(a).] Specifically Mid-Wilshire made expenditures to deter support for SEIU. We believe that these expenditures included legal fees, consulting fees and salaries of supervisors and employees "incurred for research for, or preparation, planning or coordination of, or carrying out" its campaign to "influence the decision of [their] employees" on whether to support SEIU. [Sections 16645(a) & 16646(a).]

In response to Mid-Wilshire's anti-union campaign, SEIU filed an unfair labor practice charge with the National Labor Relations Board ("the Board"). Having found merit to SEIU's charge, the General Counsel of the Board recently issued a complaint against Mid-Wilshire alleging the following violations of the National Labor Relations Act, 29 U.S.C. Section 151 *et seq.*:

> First, interrogating employees about their support for the Union.

Second, refusing to give the wage increase to Union activists that had been given to other employees and informing the Union activists that they were not~ being given the wage increase because of their support for the Union.

Third, discharging two Union activists and disciplining other Union activists because of their support for the Union.

Fourth, threatening an employee with termination because of the employee's undocumented immigration status.

Fifth, soliciting employees to sign a decertification petition to get rid of the Union.

Sixth, granting a wage increase to an employee because she signed the decertification petition to get rid of the Union-.

Seventh, failing and refusing to bargain with the Union over mandatory subjects of bargaining, such as changes to the sick leave policy and the no-loitering policy.

A copy of the complaint is enclosed. The trial is currently scheduled to begin on May 13, 2002.

Additionally, Mid-Wilshire made further expenditures to assist, promote or deter union organizing in connection with a recent campaign to convince the employees to become non-represented. [Section 16645.7(a).] Local 399 had agreed to transfer representation to Local 434B, but Mid-Wilshire refused to recognize Local 434B, instead requiring an election by the Board. Mid Wilshire's motivation was clear. As part of the election, the employees had the option of becoming non-represented. Mid-Wilshire campaigned to attempt to convince the employees to

vote for non-representation. Despite Mid-Wilshire's campaign, an overwhelming number of employees voted in the election that was held on April 19 to remain unionized and to transfer representation to Local 4 34B. We believe that Mid-Wilshire's expenditures for the campaign included legal fees, consulting fees and salaries of supervisors and employees "incurred for research for, or preparation, planning or coordination of, or carrying out" its campaign to "influence the decision of [their] employees" on whether to remain represented. [Sections 16645(a) & 16646(a).]

Based on information available to us, we believe that the expenses associated with these activities were paid from accounts where California Medi-Cal funds were commingled with other funds. [Section 16646(b).] We further believe that Mid-Wilshire has failed to maintain records sufficient to show that no state funds were used for its anti-union campaign as required by Section 16645.7(c).

In demanding records from Mid-Wilshire, please be should be sure to include a demand for records showing that supervisors and employees were not paid with state program funds to take part in Mid-Wilshire's anti-union campaigns and that (hey did not participate in those activities on time paid for by the State for the care of Medi-Cal recipients.

It is rare that an employer so blatantly and aggressively attempt to undermine its employees' right to choose whether to remain unionized. Mid-Wilshire's actions are a clear breach of the public trust and epitomize the type of conduct that AB 1889 was intended to prevent.

Please feel free to contact us if you have any

questions regarding this matter.

Yours very truly,

HOLGUIN & GARFIELD, APLC

By: /s/
Elizabeth Garfield

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD
Region 31

Case 31—CA-25336

JPH MANAGEMENT, INC., D/B/A
MID—WILSHIRE HEALTH CARE CENTER
and
SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 399, AFL-CIO

COMPLAINT
AND
NOTICE OF HEARING

Service Employees International Union, Local 399, AFL-CIO, herein called the Union, has charged that JPH Management, Inc., d/b/a Mid-Wilshire Health Care Center, herein called Respondent, has been engaging in unfair labor practices as set forth in the National Labor Relations Act, 29 U.S.C. § 151 *et seq.*, herein called the Act. Based thereon the General Counsel, by the undersigned, pursuant to Section 10(b) of the Act and Section 102.15 of the Rules and Regulations of the National Labor Relations Board, herein called the Board, issues this Complaint and Notice of Hearing and alleges as follows:

1. (a) The original charge was filed by

the Union on October 30, 2001, and a copy thereof was served on Respondent by certified mail on or about October 31, 2001.

(b) The first amended charge was filed by the Union on November 5, 2001, and a copy thereof was served on Respondent by certified mail on or about November 5, 2001.

(c) The second amended charge was filed by the Union on December 21, 2001, and a copy thereof was served on Respondent by certified mail on or about December 26, 2001.

(d) The third amended charge was filed by the Union on January 29, 2002, and a copy thereof was served on Respondent by certified mail on or about January 30, 2002.

2. (a) At all material times, Respondent, a corporation with an office and place of business in Los Angeles, California, herein called the facility, has owned and operated a nursing home for the elderly.

(b) During the calendar year ending December 31, 2002 Respondent, in conducting its business operations described above in paragraph 2(a), derives gross revenues in excess of $100, 000.00.

(c) During the calendar year ending December 31, 2001, Respondents in conducting its business operations described above in paragraph 2(a), purchased and received goods valued in excess of $40,000.00 directly from other enterprises located in California, each of which other enterprises received such goods in substantially the same form directly from points located outside of the State of California.

3. At all material times, Respondent has

been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

4. At all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

5. At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act:

Samuel Park — Administrator

Firs. Chin — Director of Nursing

Lilia Pampolino — Director of Staff Development

6. The following employees of Respondents herein called the Unit, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full—time and regular part-time dietary employees, housekeeping employees, nursing employees, clerical employees, laundry employees, maintenance employees, and activity assistants employed by the Employer at its facility located at 676 South Bonnie Brae Street, Los Angeles, California excluding bookkeeper, professional employees, guards and supervisors (including supervisory LVNs) as defined in the Act.

7. (a) Since at least 1996, and at all material times, the Union has been the designated exclusive collective-bargaining representative of the Unit, and since at least 1996 the Union has been

recognized as the representative by the Respondent. This recognition was embodied in a collective bargaining agreement which was effective by its terms from July 1, 1996, through June 20, 1999. Said agreement covered rates of pay, wages, hours of employment, and other terms and conditions of employment of the Respondent's employees employed in the Unit.

(b) From in or around May 1999 through June 1999, the Union and Respondent engaged in bargaining for a successor collective bargaining agreement.

(c) Whether or not the parties had reached agreement on a new collective bargaining agreement was the subject of Board proceedings which resulted in a Board Decision and Order in JPH Management, Inc., d/b/a Mid-Wilshire Health Care Center, 337 NLRB No. 7, which issued on December 21, 2001.

(d) While the Board in JPH Management, Inc., d/b/a Mid-Wilshire Health Care Center, 337 NLRB No. 7 (December 21, 2001), concluded that the parties had not reached agreement on a new collective bargaining agreement, it also found that Respondent violated Section 8(a) (1) and (5) of the Act by unilaterally rescinding wage increases given to employees. The Board ordered Respondent to cease and desist from engaging in such conduct in the future.

(e) In or around March 2001, the Union requested Respondent to commence bargaining for a successor collective bargaining agreement.

8. At all material times, based on Section 9(a) of the Act, the Union has been the exclusive collective bargaining representative of the Unit.

9. (a) Since the summer of 2001, and continuing to date, Respondent has failed and refused to bargain with the Union as the exclusive collective-bargaining representative of the Unit in that:

(b) in or about the summer of 2001, Respondent changed the sick leave policy contained in Article VI of the 1996-1999 collective bargaining agreement.

(c) On or about August 9, 2001, Respondent changed the no-loitering policy.

(d) The subjects set forth above in subparagraphs and 9(c) relate to wages, hours, and other terms and conditions of employment of the Unit and are mandatory subjects for the purposes of collective bargaining.

(e) Respondent engaged in the conduct described above in paragraphs 9(b) through 9(c) without prior notice to the Union and without affording the Union an opportunity to bargain with Respondent with respect to this conduct.

10. Respondent by Lilia Pampolino:

(a) In or around August 2001, at the facility, told an employee that the Employer was not giving wages to that employee or to two other employees because of their Union activity.

(b) On or about August 14, 2001, at the facility, threatened an employee concerning the employee's undocumented immigration status unless

that employee signed a petition to decertify the Union.

(c) In or around September 2001, at the facility, solicited an employee to sign a petition to decertify the Union.

(d) On or about November 12, 2001, at the facility, interrogated an employee about the employee's Union activity.

11. (a) In or around August 2001, Respondent denied wage increases to its employees Silvia Calderon, Roberto Calderon, Robert Galdamez and Rodolfo Ortiz.

(b) Respondent engaged in the conduct described above in paragraph 11(a) because the named employees of Respondent assisted the Union and engaged in protected concerted activities, and to discourage employees from engaging in these activities.

12. (a) In or around September 2001, Respondent granted a wage increase to its employee Maria Garcia.

(b) Respondent engaged in the conduct described above in paragraph 12(a) because Maria Garcia signed a petition to decertify the Union at Respondent's request, and to encourage other employees to do so.

13. (a) On or about October 24, 2001, Respondent issued three written warnings and a 3-day suspension to its employee Rodolfo Ortiz.

(b) Respondent engaged in the conduct described above in paragraph 13(a) because Rodolfo Ortiz assisted the Union and engaged in protected

concerted activities, and to discourage employees from engaging in these activities.

14. (a) On or about November 2, 2001, Respondent discharged its employee Cristina de los Santos.

(b) Respondent engaged in the conduct described above in paragraph 14(a) because Cristina de los Santos assisted the Union and engaged in protected concerted activities, and to discourage employees from engaging in these activities.

15. (a) On or about November 13, 2001, Respondent issued a warning and 3-day suspension to its employee Sofia Ruiz.

(b) Respondent engaged in the conduct described above in paragraph 15(a) because Sofia Ruiz assisted the Union and engaged in protected concerted activities, and to discourage employees from engaging in these activities.

16. (a) On or about November 14, 2001, Respondent discharged its employee Nellie Castillo.

(b) Respondent engaged in the conduct described above in paragraph 16(a) because Nellie Castillo assisted the Union and engaged in protected concerted activities, and to discourage employees from engaging in these activities.

17. By the conduct described above in paragraph 9, Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees within the meaning of Section 8(a) (5) of the Act.

18. By the conduct described above in paragraphs 11 through 16, Respondent has been

discriminating in regard to the hire or tenure or terms or conditions of employment of its employees, thereby discouraging membership in a labor organization in violation of Section 8(a)(3) of the Act.

19. By the conduct described above in paragraphs 9 through 18, Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a) (1) of the Act.

20. The unfair labor practices of Respondent described .above affect commerce within the meaning of Section 2(6) and (7) of the Act.

Dated at Los Angeles, California, this _____st day of March 2002.

_____

James J. McDermott,
Regional Director

National Labor Relations Board

Region 31

April 24, 2002

Hon. William Lockyer
Attorney General
State of California
California Department of Justice
1300 1 Street, 11th Floor
Sacramento, CA 95814

Re: St. Mary Medical Center (St. Joseph Health System) Misappropriation of Public Assets & Breach of Charitable Trust

Dear Attorney General Lockyer:

On behalf of the California Nurses Association (CNA), I am writing to advise you of serious and substantial misappropriations of state funds, received by St. Mary Medical Center (St. Joseph Health System) for public health purposes, but apparently expended for purposes expressly prohibited by Sections 16645.1, 16645.2 and/or 16645.6 of the California Government Code. CNA requests that you exercise your authority under Section 16645.7(c) to demand the production of records by St. Mary Medical Center "sufficient to show that no state funds were used" to assist, promote or deter union organizing. If such records cannot be produced, or if the records show that State funds were used for impermissible expenditures, we request that you commence a civil action against St. Mary Medical Center under Section 16645.8 for injunctive relief, damages, civil penalties, and other

appropriate equitable relief. In support of this request, CNA respectfully submits the following information.

St. Medical Center

St. Mary Medical Center (St. Joseph Health System) is an integrated health care system consisting of non-profit and for-profit entities

State Funding of St. Mary Medical Center Operations (Medi-Cal)

St. Mary Medical Center receives substantial and ongoing funding from the State of California, including Medi-Cal funds. We estimate that millions of dollars of state funds have been paid to the Medical Center over the past five years.

Registered Nurses' Organizing Campaign —St. Mary Medical Center Funding of an Anti-Union Campaign with Misappropriated Assets and Public Funds

The Registered Nurses employed by St. Mary Medical Center are actively engaged in an organizing campaign to win exclusive representation by the California Nurses Association, exercising rights of organization guaranteed by the NLRA Section 7. The St. Mary Medical Center Board and management are hostile to CNA and oppose collective action and exclusive representation by Registered Nurses. St. Mary Medical Center has and continues to actively interfere with nurses' exercise of statutory rights to "self organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining."

St. Mary Medical Center management is engaged in an aggressive, heavily financed campaign to defeat collective organization of St. Mary Medical Center Registered Nurses and their representation by the California Nurses Association. Because of the extent of "persuader" activity and the substantial costs of the employer campaign, it is likely that St. Mary Medical Center has commingled public funds received from the State of California, including Medi-Cal reimbursements, with other funds that have been expended for legal and consulting fees and salaries of St. Mary Medical Center supervisors and employees, and on research, preparation, planning, coordination, and carrying out activities to interfere with and deter the St. Mary Medical Center nurses' organizing for representation by CNA. Such expenditures are expressly prohibited by state law. (Govt. Code § 16645.6, 16646.)

The misappropriation of funds includes significant expenditures on a highly visible public relations campaign and the retention of "persuader labor consultants" to directly address registered nurses in one-to-one as well as mandatory meetings on employee paid tune. (See enclosed full page newspaper ads and declarations of registered nurses.)

Thank you for your immediate attention to this flagrant abuse of Registered Nurses' tights and California taxpayers. Please call me if you have any questions.

Respectfully submitted,

____/s/_____
David Johnson
Southern California Director

April 25, 2002

Bill Lockyer, Attorney General State of California
Department of Justice
1300 I Street
P.O. Box 944288
Sacramento, CA 94244-2550

Re: Enforcement of AB 1889 Against Laidlaw Transit Services, Inc. in Irvine, California

Dear Attorney General Lockyer:

This office is legal counsel to Teamsters Local 952 ("Union") in the above referenced matter. This letter is to provide 60 days notice under Government Code §16645.8 of violations of AB 1889 by Laidlaw Transit Services, Inc. ("Employer").

The Union has been involved in an organizing campaign of the Employer at its facility located at 16281 Construction Circle, West, Irvine, CA 92806. The Employer is a contractor for the Orange County Transportation Authority ("OCTA"). The Employer receives state funds for supplying transportation services for OCTA. OCTA is a transit authority authorized pursuant to the Public Utility Code.

The Union filed a petition for representation of the employees of the Employer with the -National Labor Relations Board ("NLRB") on January 28 2002. This election in the case has been blocked by the union's filing of unfair labor practice charges against the Employer.

On March 21, 2002 the union notified Jim Byrne, the general manager for the Employer, of the

application of AB 1889. The Union has knowledge of the Employer was and is holding captive audience meetings with employees on the Employer's premises and has paid employees for attendance at these meetings. The sole purpose of these meetings is to dissuade employees from seeking union representation from the Union. A copy of the Union's letter to Tim Byrne is submitted herewith.

On March 25, 2002 I was informed by legal counsel for the Employer that it would not be complying with AB 1889 because of its opinion that the law was unconstitutional and unenforceable under both the California Constitution and the United States Constitution. A copy of Theodore Scott's letter to me dated March 25, 2002 is submitted herewith.

Based on the foregoing, the Union requests that your office seek enforcement of AB 1889 against Laidlaw Transit Services, Inc. In the alternative, the Union is providing you with 60 days notice as required by the law. Please do not hesitate to contact me for additional information including evidence in support of this complaint.

Very truly yours,

Florice Hoffman

March 25, 2002

Florice Hoffman, Esq.
Attorney at Law
Law Offices of Florice Hoffman
8502 East Chapman Avenue, Suite 353
Orange, California 92869

Re: Laidlaw Transit Services, Inc. and Teamsters Local Union 952

Dear Ms. Hoffman:

As you know, I represent Laidlaw Transit Services, Inc. with respect to labor relations matters, including Teamsters Local 952's organizing activity at Laidlaw's Irvine, California facility. Laidlaw has asked me to respond to your client's March 21, 2002 letter to Mr. Byrne. A copy of Local 952's March 21 letter is attached hereto for your reference.

Laidlaw's efforts in providing information to its employees relating to Teamsters Local 952's organizing efforts are in accordance with federal and state law. While I am sure Teamsters Local 952 would like to prevent employees from learning the true facts about union representation generally, and Teamsters Local 952 specifically, Laidlaw believes that such information should be made available so that employees may make a free and informed decision when deciding whether they wish to be represented by your client. Laidlaw will continue its efforts towards providing such information, and will not be cowed by your client's baseless accusations.

I would also note that the legislation referred to in your client's March 21 letter is unconstitutional and therefore unenforceable for many different reasons. The intent of the legislations is to prevent speech which is protected by both the United States Constitution and the California Constitution. The legislation also violates an employer's right under the National Labor Relations Act to communicate its opinions regarding union representation to its employees. For these and other reasons, the legislation cannot withstand judicial scrutiny.

Please do not hesitate to contact me if you would like to discuss this matter further.

/s/
Theodore R. Scott
of
LUCE, FORWARD, HAMILTON & SCRIPPS LLP

LOCAL UNION NO. 952
GENERAL TRUCK DRIVERS, OFFICE, FOOD AND WAREHOUSE UNION

March 21, 2002

Jim Byrne
General manager
Laidlaw Transit Service
16281 Construction Circle, West
Irvine, CA 92806

Re: Assembly AB 1889; The Right to Organize

Dear Mr. Byrne:

This letter is to inform you that is the position of Teamsters Local 952, hereinafter referred to as the Union, that the above referenced California state law applies to Laidlaw Transit Services, Inc. hereinafter referred to as Laidlaw. In addition, Laidlaw may have already taken actions in conflict with this recent law.

AB 1889, applies to an Employer that receives state funds for supplying services pursuant to a written contract with the state or any of its agencies. This law forbids the use of state funds to influence the decisions of its employees to support or oppose a labor organization that seeks to represent its employees. AB 1889 also applies to Employers that receive monies from special districts such as the Orange County Transportation Authority (OCTA"). It is the union's understanding that Laidlaw receives monies from the State and OCTA for its operations.

Moreover, Laidlaw may have already violated this law by holding persuader meetings with employees and applicants for employment. The Union is willing to settle these potential violations, amicably without resort to litigation, if a neutrality agreement can be worked out for the upcoming NLRB election.

AB 1889 does not prohibit providing this Union with access to Laidlaw Transit's property or facility under such a neutrality agreement. The Union looks forward to meeting with you to discuss this matter further. Please contact me upon your receipt of this letter for the purpose of scheduling a mutually convenient time to meet. I can be reached at (714) 740-6242 and await your timely reply.

Respectfully,

Patrick D. Kelly
Secretary Treasurer

SERVICE EMPLOYEES
INTERNATIONAL UNION AFL-CIO CLC
1538 Market Street, Suite 4
Redding, CA 96001
530.244.7811

May 1, 2002

Mr. Bill Lockyer
Attorney General
Attn: Mr. Ralph Lightstone
Department of Justice
1300 I Street, Suite 1740
Sacramento, CA 95814

Subject: Siskiyou Training & Employment Program, Inc. (STEP)

Dear Mr. Lightstone:

I am a Field Representative and Organizer for Service Employees International Union, Local 1292. Among my duties are organizing new bargaining units. I am writing to request your office's assistance in enforcing the Cedillo Neutrality in Government law.

This Union recently organized a small bargaining unit at the above-named employer. STEP is a Workforce Investment Act contractor, organized along the lines of the various Private Industry Councils around the state, and, I believe, receives State funds to administer its various programs. The employer has hired an attorney to resist the Union organizing drive. The employer has also engaged in

conduct subsequent to the filing of our recognition petition which led to the filing of two Unfair Practice charges with the National Labor Relations Board. I believe the employer to be a grant recipient as defined in Gov. Code § 16645.2 who has not complied with the record-keeping requirement of Gov. Code § 16645.2(c), segregating State funds from general revenues. Therefore, STEP has violated Gov. Code § 16645.1, which prohibits use of State funds to assist, promote, or deter Union organizing.

Please contact me and I will provide any additional document or other information you request. Thank you in advance for your assistance in this matter.

Robert Bolger, Field Representative/Organizer

Altshuler, Berzon, Nussbaum, Rubin & Demain
Attorneys At Law
177 Post Street, Suite 300
San Francisco, CA 94106

May 16, 2002

The Honorable Bill Lockyer
Attorney General
State of California
California Department of Justice
1300 I Street, 11th Floor
Sacramento, CA 95814

Re: Ensign Group, Inc. d.b.a. Sonoma Health Care Center Government Code Section 16645.8(b) Sixty Day Notice

Dear Attorney General Lockyer:

I am writing on behalf of Service Employees International Union ("SEIU") Local 250 to provide you with a 60-day notice pursuant to Government Code Section 16645.8(b). SEIU Local 250 believes that Ensign Group, Inc. d.b.a. Sonoma Health Care Center (hereinafter "Sonoma") has impermissibly used state funds to "assist, promote or deter union organizing" in violation of Government Code Section 16645.7.

We request that you exercise your authority under Section 16645.7(c) to demand the production of records by Sonoma "sufficient to show that no state funds were used" to assist, promote or deter union organizing. If such records cannot be produced, or if

the records show that state funds were used for impermissible expenditures, we request that you commence a civil action against Sonoma under Section 16645.8 for injunctive relief, damages, civil penalties, and other appropriate equitable relief. In support of this request, SEIU Local 250 respectfully submits as follows:

Ensign Group, Inc. owns a nursing home called the Sonoma Health Care Center at 1250 Broadway in Sonoma, California. Sonoma is a participant in the state Medi-Cal program, and receives a majority of its total annual income through that program. We believe that Sonoma has already received more than $10,000 in Medi-Cal program funds during this calendar year. Gov't Code §16645.7.

On May 24, 2002, a union representation election will be held among Sonoma's employees. Starting on or about May 9, 2002, Sonoma began making expenditures to assist promote or deter union organizing. Gov't Code § 16645.7(a). Specifically, Sonoma has made expenditures to deter the organizing of its employees by SEIU Local 250. These expenditures include paying the fees and expenses of consultants to "research," "prepare," "plan," "coordinate," and "carry out" its campaign to "influence the decision of its employees" on whether to support SEIU Local 250. Gov't Code §§ 16645(ä), 16646(a).

Sonoma has contracted with Labor Relations Services, Inc., of Newport Coast, California, to deter union organizing. Representatives of Labor Relations Services, Inc. have been present at Sonoma every day since approximately May 9, 2002. Starting on or about May 9, 2002, representatives of Labor

Relations Services, Inc. have conducted approximately fifteen meetings with groups of Sonoma employees. These employee meetings are mandatory, take place on Sonoma's premises during work hours, and last for approximately 85 to 135 minutes. At least two of the individuals running these meetings are registered with the United States Department of Labor as direct contact persuaders. Sonoma employees have informed SEIU Local 250 that the purpose of these meetings is to convince them to vote against representation by SEIU Local 250 in the upcoming election.

Sonoma is also conducting one-on-one meetings with employees to deter them from organizing. These meetings are explicitly mandatory and are conducted on Sonoma's premises. Moreover, Sonoma is distributing anti-union literature to its employees, some of which is signed by Sonoma administrators. Finally, Sonoma supervisors have been campaigning against the union on Sonoma's premises during working hours. SEIU Local 250 believes that Sonoma's supervisors and employees have been compensated for their time spent in these activities to deter union organizing.

Based on the information available to us, we believe that Sonoma paid expenses associated with the above-mentioned activities from accounts where state Medi-Cal funds were commingled with other funds. Gov't Code § 16646(b). We further believe that Sonoma has failed to maintain records sufficient to show that no state funds were used for its anti-union activities as required by Section 16645.7(c).

In demanding records from Sonoma, you should be sure to include a demand for records showing that

supervisors and employees were not paid with state funds to take part in Sonoma's anti-union activities, and that they did not participate in those activities on time paid for by the state for the care of Medi-Cal recipients.

Please feel free to contact me with any questions regarding this matter.

Respectfully submitted,

Stephen P. Berzon

Operating Engineers Local Union No. 3
1620 South Loop Road
Alameda, CA 94502-7090
(510) 648-7400

Bill Lockyer
Attorney General
Attn: Ralph Lightstone
Department of Justice
1300 I Street, Suite 1740
Sacramento, CA 95814

Dear Mr. Lightstone:

I am the Director of Public Employees for Operating Engineers Local Union No. 3. Among my duties are to organize and direct the organizing in Public Employee Bargaining units. The Union recently organized a small bargaining unit in the [unreadable]. Taking advantage of newly amended Meyers-Milias-Brown Act, the Union demanded notice on the basis of a majority of cards in appropriate units. The employer has refused to recognize the Union for -approximately three months. The employer has hired an attorney to resist the Union organizing drive. The employer, the Rancho Murieta Community services District, is a grant recipient under Gov. Code § 16645.2 and has not complied with the record keeping requirement of 16645.2(c), segregating state money from general revenues. Therefore, the Rancho Murieta Community services District has violated Gov. Code § 16645.1 prohibiting use of state funds to assist, promote or deter union organizing.

Please contact me and I will provide any additional documents or other information you request. Thank you in advance for your assistance in this matter.

Sincerely,

Kurt Benefield
Director, Public Employees

May 23, 2002

Mr. William Lockyer
Attorney General
California Dept. of Justice
1300 I Street, 11th Floor
Sacramento, CA 95814

Re: Valley Health System

Dear Attorney General Lockyer:

I am writing to you on behalf of SEIU Locals 399 and 12IRN in accordance with Government Code Section 16645.8(b) to call to your attention the apparent unlawful use of state funds by Valley Health System to deter union organizing.

Valley Health System is a California Local Health Care District that owns and operates three acute care hospitals, including Moreno Valley Community Hospital ("Moreno Valley"). Valley Health System is a public employer, and it receives state funds. For the past two months, workers at Moreno Valley have been involved in union organizing activity with the assistance of SEIU Locals 12IRN and 399. Valley Health System has responded to the union organizing campaign by making expenditures to deter the union organizing efforts.

Among the expenditures Valley Health. System has made to deter union organizing is the compensated work time of its supervisors and employees while participating in the various components of its anti-union campaign. Supervisors

have participated in anti-union orientation and training sessions on work time. At these training sessions; supervisors have been instructed to campaign against the unions. In addition to paying supervisors to attend-these training sessions designed to deter union organizing, Valley Health System has also held mandatory group meetings for employees regarding unionization. The message that supervisors have conveyed to workers during these mandatory meetings is that the workers are better off without a union — these meetings are clearly an attempt "to influence the decision" of the employees about whether to support or oppose the union.

The workers who were required to attend anti-union meetings were not paid with separate checks for the time spent in these meetings. Thus, we have every reason to believe the expenditures to deter union organizing were paid from accounts where state funds were commingled with other funds.

SEIU Locals I21RN and 399 are prepared to provide you with specific dates and times when mandatory anti-union meetings took place. Please contact me to obtain this evidence or if you have any additional questions regarding this matter.

Sincerely,

Andrew Strom

Attorney for SEIU Local
121RN and SEIU Local 399

Beeson, Tayer & Bodine
Attorneys At Law, A Professional Corporation
1404 Franklin Street, Fifth Floor
Oakland, California 94612
(510) 625-9700

February 19, 2002

California Department of Justice
Public Inquiry Unit
P.O. box 944255
Sacramento, CA 94244-2550

Re: MV Transportation, Inc. and Teamsters Local 78 (Govt. Code § 16646)

Dear Madam or Sir:

In a letter dated February 6, 2002, I informed you of MV Transportation, Inc.'s violation of Government Code 16645, et seq. I have attached anti-union literature which MV Transportation, Inc. has distributed to its employees.

This literature unquestionably proves MV Transportation, Inc. is in violation of its obligation as a state contractor to remain neutral in a union organizing drive.

Please contact me if you need further information.

Very truly yours,

Sheila K. Sexton

MEMORANDUM

To: All San Leandro Division Employees

From: _____

Date: February 15, 2002

Subject: Rumor Control

A standard tactic in any union organizing drive is to float rumors that are designated to give the impression that merely voting in a union is the answer to all the problems in any business. As we look closely at those rumors, however, we find that they have no basis in truth.

Part of my job as the Division Manager is to counter those rumors with facts. The big rumor this week was that "going union" would help this operation with its relations with our customers. One remark was even made that public transit customers do not want to do business with union-free companies. Nothing could be further from the truth. Remember what was contained in ___ letter to you.

Fact: Laidlaw, a unionized operation represented by Teamsters local 78, the very same union to get your vote, LOST the East Bay Regional Center Contract when it was awarded to us . . . a union-free operation.

Fact: Paratransit Services, another unionized operation represented by the TEAMSTERS, just lost their contract in San Francisco.

Fact: All of the other providers are faced with EXACTLY the same challenges as we are and the

ones represented by the Teamsters have not been helped by the Teamsters at all.

Fact: MV Transportation is the only organization fighting on behalf of MV Transportation employees to improve routes, schedules and hours. Alex and I go to meetings with our customers at EVERY opportunity . I have NEVER seen a Teamster representative at ANY meeting to speak on behalf of MV Transportation employees or any union members.

One thing you will hear from me over and over between now and March 6 is:

If the Teamsters have the expertise, the commitment and the employee relations skills to run a Paratransit or Regional Center operation and if they think they have the inside track with the customers, then why in the world don't they bid to run an operation on their own and show us how to do it?

UNION RULES ! --. WILL THEY CONTROL YOU?

The Teamsters and their high pressure union pushers are trying to convince you that you are the union.

The fact is, according to the law, the Teamsters are required to file their Constitution (the Union Rules) with the U.S. Government. If you become Teamsters, you must live by 183 pages of rules they already have.

YOU DO NOT GET TO WRITE YOUR OWN SET OF RULES.... Like you would if you were really the Union.

Have the Teamsters and their high pressure pushers shown you their rules?

IF NOT, WHY NOT?

Here are just SOME of the things contained in their Constitution. As you can see, it would. give the Teamsters a great- deal of authority and control over you and your work life.

* * * * *

Beeson, Tayer & Bodine
Attorneys At Law, A Professional Corporation
1404 Franklin Street, Fifth Floor
Oakland, California 94612
(510) 625-9700

February 6, 2002

California Department of Justice
Public Inquiry Unit
P.O. box 944255
Sacramento, CA 94244-2550

Re: MV Transportation, Inc. and Teamsters Local 78 (Govt. Code § 16646)

Dear Madam or Sir:

This office represents Teamsters Local 78 which recently embarked upon an organizing campaign among MV Transportation, Inc.'s San Leandro-based employees. I am contacting your office to report MV Transportation's violations of California Government Code § 16645, to request that the Attorney General's office bring suit against MV Transportation pursuant to Government code § 16645.8(a), and to give notice, pursuant to Government C ode § 16645.8(b), that should the Attorney General fail to initiate such action Local 78 will itself initiate civil action against MV Transportation to enforce the applicable statute.

MT Transportation, from its San Leandro facility, provides Para transit services pursuant to a contract originating with the State of California Department of Developmental Services. As such, MV

is a "state contractor" within the meaning of Govt. code § 16645(c).

Govt. code § 16645.3 prohibits state contractors from taking any action to "deter union organizing" by its employees. Nonetheless, MV in the past few weeks has embarked upon an aggressive anti-union campaign to discourage its employees from supporting Local 78. This campaign so far has included mandatory employee meetings led by outside consultants. This consultant, from Cruz and Associates, a known union-busting firm, stated in one such meeting that it was not neutral with regard to the employee's organizing efforts, but rather was emphatically anti-union. Additionally, Local 78 has been forced to file several unfair labor practices charges with the National Labor Relations Board over MV's anti-union actions. Local 78 is documenting these and other violations and intends o seek full enforcement of the laws protecting the MV employees' right to organize.

Very truly yours,

Sheila K. Sexton

Palomar Pomerado Health
Administration
15255 Innovation Drive, Suite 204
San Diego, CA 92128-3410
(858) 675-5100

February 18, 2002

Mr. Ted Cahill
Organizer
California Nurses Association
425 West Broadway, Suite 111
Glendale, CA 91204

Re Letter Request for Information

Dear Mr. Cahill:

This letter acknowledges that Palomar Pomerado Health ("PPH") is in receipt of your letter to PPH's Board of Directors (the "Board"), dated February 11, 2002, in which you request certain PPH information and allege that the Board and its members have breached their fiduciary duties and misappropriated and/or improperly expended state funds. With respect to these allegations, PPH categorically denies that it, its Board, or the members thereof have engaged in any illegal, unethical or otherwise improper behavior in connection with PPH's registered nurses and their efforts to unionize.

As for the portion, of your letter requesting PPH information, you have asked PPH to: (1) publicly disclose all funds received by PPH from the State of California and identify the specific disbursements of such funds; and (2) "report the total amount and itemization of all expenditures made to

deter or influence the decisions of PPH Registered Nurses regarding the selection of the California Nurses Association as their exclusive collective bargaining representative."

To begin, we reiterate that none of the expenditures by PPH made in connection with PPH's registered nurses arid their recent efforts to unionize have improperly implicated any law, regulation, or ethical obligation on the part of PPH cc its Board. That being said, we deem your letter and the information requests therein as requests for public disclosure of PPH records pursuant to the Public Records Act, Government Code Section 6250 *et seq.* (the "PRA"). In this regard, your letter does not reasonably describe identifiable or specific PPH records that may be subject to disclosure under the PRA, as required by California Government Code Section 6253(b).

As a result, PPH cannot provide you with records containing the information you have requested until PPH receives a request conforming with the PRA.

Very truly yours,

Norman F. Gruber

President and Chief Executive Officer

Van Bourg, Weinberg, Roger & Rosenfeld
A Professional Corporation
1006 4th Street, Suite 1050
Sacramento, CA 95814
(916) 443-6600

May 20, 2002

Suzanne M. Ambrose
Deputy Attorney General
Office of the Attorney General
Department of Justice
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550

Re: *Chamber of Commerce of U.S., et al. v. Bill Lockyer, as Attorney General, et al.* USDC, Central District, Case No. SACV02377 DOC (ANX)

Dear Ms. Ambrose:

I am writing to follow up on your April 29th, 2002 letter in which you sent me a copy of the Chamber of Commerce lawsuit that was filed in early April in the Central District. As you may know, our law firm is the largest Union-side labor law firm on the West Coast. We represent many local unions and federations of various unions. My clients are very interested in the Cedillo Bill. As you may have noticed, several unions in the Sacramento Valley have been sending letters to the Attorney General's Office notifying the Attorney General of probable violations of the Cedillo law. As such, it would be very helpful for the labor movement in general, and

my clients in particular, if you keep me aware of the status of any injunction. An order from the Court denying an injunction will have a significant positive effect on various organizing drives that are going on here in the valley.

I believe you will find, as you are introduced to factual circumstances of the various Cedillo violations, that California employers as a matter of course use public funds to finance anti-Union campaigns that are at times quite vicious. Please do not hesitate to contact me if you are in need of factual examples of the use of public money to affect the outcome of an organizing drive.

Thank you for your attention to this matter.

Sincerely,

Matthew J. Gauger

Feysan Lodde
Alex Lodde
M V Transportation, Inc.
50 Elmira Street
San Francisco, CA 94124

RE: California Government Code Section 16645.7

Dear Sirs:

California Government Code section 16645.7 effective January 1, 2001, provides that a private employer receiving state funds in excess of $10,000 per calendar year on account of its participation in a state program "shall not use any of those funds to assist, promote, or deter union organizing." Section 16645.7, subdivision (c), provides that any private employer subject to this statute who makes expenditures to assist, promote, or deter union organizing must maintain records sufficient to show that no state funds were used for those expenditures. The Attorney General of California is charged with enforcement of the provisions of this statute, and any employer subject to this law is required to provide these records to the Attorney General upon request.

California Government Code section 16645.3, subdivision (a), provides that no state contractor "shall assist, promote, or deter union organizing by employees who are performing work on a service contract, including a public works contract, for the state or a state agency." Section 16645.3, subdivision (b), provides that a state contractor that violates section 16645.3 subdivision (a), is "liable for a civil penalty of one thousand dollars ($1,000) per employee per violation. The Attorney General of California is charged with enforcement of the

provisions of this statute under California Government Code section 16645.8.

It has been reported to the Attorney General that MV Transportation, Inc. ("MV Transportation") receives over $10,000 per calendar year as a result of its participation in the State's Medi-Cal program. Furthermore, it has been reported that MV Transportation provides paratransit services to Medi-Cal beneficiaries pursuant to a contract with the California Department of Health Services. This office has received a written notice pursuant to Government Code section 16645.8, subdivision (b), alleging that, within the past several months, MV Transportation has made expenditures to deter union organizing, and has taken action to deter union organizing by its employees.

Specifically, the notice alleges that MV Transportation has attempted to influence its employees in deciding whether to become members of a labor organization. The notice alleges that Vincent Weber, Safety Director, and Duane Crowley, Assistant Division Manager, asked employees about their union sentiments. In addition, the notice alleges that Folole Ione, Dispatcher, directed a driver's aide not to sign a labor organization authorization card. The notice also alleges that Mark Elias, Division Manager; Vincent Weber, Safety Director, John Siragusa, Customer Relations Manager; and Alex and Feysan Lodde, Owners of MV Transportation, conducted meetings with groups of workers on work time. The notice further alleges that MV Transportation employees were compensated for the time that they spent at these meetings or during the inquiries from Vincent Weber,

Duane Crowley, and Folole Ione. The notice alleges that MV Transportation improperly used State Medi-Cal funds to pay for the salaries of employees and managers during their attendance at the alleged anti-anion organizing meetings and activities.

On this basis, it is alleged that MV Transportation has taken action to deter union organizing by its employees who were performing work on a service contract for a state agency within the meaning of section 16645.3, after January 1, 2001. Furthermore, it is alleged that MV Transportation made expenditures to deter union organizing within the meaning of section 16645.7, after January 1, 2001. These expenditures are alleged to include, but not be limited to:

> The salaries of Mark Elias, Vincent Weber, John Siragusa, Duane Crowley, Folole Ione, Alex Lodde, Feysan Lodde, and any and all MV Transportation supervisory/management personnel during times spent in attending the meetings, and other alleged anti-union activity and/or inquiries described above, as well as time spent in preparation, planning, and coordination of these meetings;
>
> The salaries of any and all employees of MV Transportation who received compensation for time spent attending such meetings and other alleged anti-union activity and/or inquiries; and
>
> Any costs of printing, duplicating, mailing, or distributing any documents given to MV Transportation employees in connection with any such meetings.

Please, therefore, provide no later than February 25, 2002, "records sufficient to show that no state funds were used" for these expenditures. In particular, please provide records sufficient to show the source of funding for these expenditures and sufficient to show that the Medi-Cal program did not reimburse MV Transportation for any time spent by any MV Transportation employees attending or planning for these meetings or involvement in any other alleged anti-union activity and/or inquiries.

Thank you for your prompt attention to this matter. I look forward to receiving your response.

Sincerely,

REGINA J. BROWN
Deputy Attorney General

For BILL LOCKYER
Attorney General

June 24, 2002

Hon. William Lockyer
Attorney General
State of California
California Department of Justice
1300 I Street, 11th Floor
Sacramento, CA 95814

Re: Palomar Pomerado Health System
Misappropriation of Public Assets & Breach of Charitable Trust

Dear Attorney General Lockyer:

On behalf of the California Nurses Association (CNA), I am writing to inform you that CNA and the above employer have resolved our differences. CNA has now achieved collective bargaining recognition for the almost 600 Registered Nurses employed by the above system.

For that reason, CNA hereby withdraws and dismisses with prejudice the claim we filed with your office regarding conduct violating the provisions of AB 1889. We strongly encourage you to take no further action against the employer or any of its public officials, including its Board Members, with respect to this issue.

On behalf of the Registered Nurses we represent, thank you for your assistance in assuring that their right to CNA representation has prevailed.

Sincerely,

David M. Johnson
Southern California Director

IN THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

Case No. SAC V02377GLT(ANx)

The Chamber of Commerce of the United States, *et al.*

Plaintiffs,

v.

Bill Lockyer in his capacity as Attorney General of the State of California, The Department of Health Services, Frank G. Vanacore as the Chief of the Audit Review and Analysis Section of the California Department of Health Services, and Diana M. Bonta R.N., Dr., P.H. as the Director of the California Department of Health Services and DOES 1 through 10,
Defendants,

and

American Federation of Labor and Congress of Industrial Organizations and California Labor Federal, AFL-CIO
Intervenors.

DECLARATION OF GENE MORROW IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, PARTIAL SUMMARY JUDGMENT

DECLARATION OF GENE MORROW

I GENE MORROW, declare and state as follows:

1. The following matters stated in this declaration are true of my personal knowledge.

2. I am a Research Analyst II in the Long Term Care Reimbursement Unit of the Rate Development Branch of the California Department of Health Services (Department). I have been employed within the Rate Development Branch of the Department since 1984, with the exception of approximately three years that I was employed with the California Department of Transportation. In order for California to obtain federal financial participation for payments made under the Medi-Cal program, federal regulations require the Department to submit and obtain federal approval of a State Plan. My duties include the preparation of amendments to provisions of the federally approved State Plan that concern Medi-Cal reimbursement policy for long-term care providers. The Department must obtain approval of state plan amendments (SPAs) from the United States Centers for Medicare and Medicaid Services (CMS), which is the federal agency responsible for administering both the Medicare and Medicaid programs.

3. I participated in the Department's preparation of SPA 02-006, which was submitted to CMS on February 28, 2002. A true and correct copy of the Department's request for approval of SPA 02-006 is attached to this declaration as Exhibit A. SPA 02-006 amends various portions of the state plan that set forth the rate setting methodology for Medi-

Cal reimbursement rates for long-term care providers, hospitals, federally qualified health centers, and rural health clinics. Under longstanding State Plan provisions, providers' allowable costs have played a role in determining the ultimate reimbursement rates paid to these providers. For years, the Department's policy, as reflected in the State Plan, has been to define a provider's allowable costs as those that would be allowable under Medicare reimbursement principles. SPA 02-006 amended the State Plan to clarify that allowable costs do not include expenditures to assist, promote, or deter union organizing to the extent such expenditures are paid by the provider with State funds.

4. On April 5, 2002, CMS approved SPA 02-006. A true and correct copy of CMS' approval letter and the approved state plan provisions are attached to this declaration as Exhibit B to this declaration.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at Sacramento, California, this 1st day of August 2002.

/s

GENE MORROW

DEPARTMENT OF HEALTH SERVICES
714 P Street, Room 1253
P.O. Box 942732
SACRAMENTO, CA 94234-73230
(916) 654-0391

February 28, 2002

Ms. Linda Minamoto
Associate Regional Administrator
Division of Medicaid-Region IX
Department of Health and Human Services
Centers for Medicare and Medicaid Services
75 Hawthorne Street, Fourth Floor
San Francisco, CA 94105-3903

Dear Ms. Minamoto:

STATE PLAN AMENDMENT NO. 02-006

Enclosed is California's State Plan Amendment (SPA) No. 02-006 which includes changes to the State Plan for long term care, hospitals and Federally Qualified Health Clinics or Rural Health Clinics. These changes do not affect the rate setting methodology, but clarify what may be included as allowable costs. The Department of Health Services (DHS) is requesting an effective date of August 1, 2002.

In these amendments, DHS is proposing to add Section II.L to Attachment 4.19-A, Section I to Attachment 4.19-B, and Section II.B.4 to Attachment 4.19-D to clarify that allowable costs do not include

expenditures to assist, promote, or deter union organizing to the extent that such expenditures are paid by the provider with state funds.

Included are the amended pages for the SPA for all three of the above referenced attachments. Should you or your staff have any questions, please contact Mr. Roberto B. Martinez, Chief of the Medi-Cal Policy Division, at (916) 657-1542.

Sincerely,

Gail L. Margolis, Esq.
Deputy Director
Medical Care Services

L.

1) Allowable costs, as that term is used in Section II.A.2, and elsewhere in this Attachment 4.19-A, shall not include provider expenditures to assist, promote, or deter union organizing to the extent such expenditures are paid by the provider with State funds. Definitions applicable to this paragraph L are set forth below in subparagraphs 2) and 3).

2) "Assist, promote, or deter union organizing" means any attempt by the provider to influence the decision of its employees in California, or the California employees of its subcontractors, regarding either of the following:

(a) Whether to support or oppose a labor organization that represents or seeks to represent employees

(b) Whether to become a member of any labor organization.

3) "State funds" means California State Treasury funds or California State special or trust funds received by the provider on account of the provider's participation in a California state program. If State funds and other funds are commingled, any expenditures to assist, promote, or deter union organizing shall be allocated between State funds and other funds on a pro rata basis

4) Any costs, including legal and consulting fees and salaries of supervisors and employees, incurred for research for, or preparation, planning, or coordination of, or carrying out, an activity to assist, promote, or deter union organizing shall be

treated as paid or incurred for that activity

5) To the extent the costs are not for expenditures to assist, promote, or deter union organizing, reasonable costs incurred are allowable for activities, such as:

(a) Addressing a grievance or negotiating or administering a collective bargaining agreement.

(b) Allowing a labor organization or its representatives access to the provider's facilities or property.

(c) Performing an activity required by federal or state law or by a collective bargaining agreement.

(d) Negotiating, entering into, or carrying out a voluntary recognition agreement with a labor organization.

J. Payment for Services for Recipients with Medicare/Medi-Cal or Child Health and Disability Program (CHDP) Coverage

Where a recipient has coverage under the Medicare or the CHDP program, DHS will supplement the payment from those programs not to exceed the prospective payment rates established under this Supplement.

K. Limitations of Allowable Costs – State Funds

1. To the extent that any FQHC or RHC receives cost based reimbursement under subparagraphs (A) (2) or (F) (2), allowable costs shall not include provider expenditures to assist, promote, or deter union organizing to the extent such expenditures are paid by the provider with State funds. Definitions applicable to this paragraph I are set forth below in subparagraphs 2 and 3.

2. "Assist, promote, or deter union organizing" means any attempt by the provider to influence the decision of its employees in California, or the California employees of its subcontractors, regarding either of the following:

(a) Whether to support or oppose a labor organization that represents or seeks to represent employees.

(b) Whether to become a member of any labor organization.

3. "State funds" means California State Treasury funds or California State special or

trust funds received by the provider on account of the provider's participation in a California state program. If State funds and other funds are commingled, any expenditures to assist, promote, or deter union organizing shall be allocated between State funds and other funds on a pro rata basis.

4. Any costs, including legal and consulting fees and salaries of supervisors and employees, incurred for research for, or preparation, planning, or coordination of, or carrying out, an activity to assist, promote, or deter union organizing shall be treated as paid or incurred for that activity.

5. To the extent the costs are not for expenditures to assist, promote, or deter union organizing, reasonable costs incurred are allowable for activities, such as:

(a) Addressing a grievance or negotiating or administering a collective bargaining agreement.

(b) Allowing a labor organization or its representatives access to the provider's facilities or property.

(c) Performing an activity required by federal or state law or by a collective bargaining agreement.

(d) Negotiating, entering into, or carrying out a voluntary recognition agreement with a labor organization.

3. For purposes of determining reasonable compensation of facility administrators, pursuant to Chapter 9 of the CMS Provider Reimbursement Manual (HIM 15) — reproduced in full at Paragraph 5577 of the CCH Medicare and Medicaid Guide, the State shall conduct its own survey. Based on the data collected from such surveys, the State shall develop compensation range tables for the purpose of evaluating facility administrator compensation during audits of those facilities.

   For purposes of this section, "facilities" are defined as: acute care, long term care (skilled nursing, intermediate care, intermediate care for the developmentally disabled, intermediate care for the developmentally disabled habilitative and nursing), Federally Qualified Health Centers, and Rural Health Clinics.

4. (a) Allowable costs shall not include provider expenditures to assist, promote, or deter union organizing to the extent such expenditures are paid by the provider with State funds.

   Definitions applicable to this paragraph 4 are set forth below in subparagraphs (b) and (c).

   (b) "Assist, promote, or deter union organizing" means any attempt by the provider to influence the decision of its employees in California, or the California employees of its subcontractors, regarding

either of the following:

(i) Whether to support or oppose a labor organization that represents or seeks to represent employees.

(ii) Whether to become a member of any labor organization.

(c) "State funds" means California State Treasury funds or California State special or trust funds received by the provider on account of the provider's participation in a California state program. If State funds and other funds are commingled, any expenditures to assist, promote, or deter union organizing shall be allocated between State funds and other funds on a pro rata basis.

(d) Any costs, including legal and consulting fees and salaries of supervisors and employees, incurred for research for, or preparation, planning, or coordination of, or carrying out, an activity to assist, promote, or deter union organizing shall be treated as paid or incurred for that activity.

(e) To the extent the costs are not for expenditures to assist, promote, or deter union organizing, reasonable costs incurred are allowable for activities, such as:

(i) Addressing a grievance or negotiating or administering a collective bargaining agreement.

(ii) Allowing a labor organization or its representatives access to the provider's facilities or property.

(iii) Performing an activity required by federal or state law or by a collective bargaining agreement.

(iv) Negotiating, entering into, or carrying out a voluntary recognition agreement with a labor organization.

III. AUDITS

A. Except for DP/NFs, subacute, pediatric subacute, transitional inpatient care units, NF-As, ICF/DDs and state-operated facilities, a minimum of 15 percent of cost reports will be field audited by the Department each year. Facilities identified for audit shall be selected on a random sample basis, except where the entire universe of a class is selected for audit. Field audits may be restricted to facilities that have a complete year of reporting. The sample size for each shall be sufficiently large to reasonably expect, with 90 percent confidence, that it will produce

a sample audit ratio which varies from the estimated class population audit ratio by not more than two percent. Other facilities may be audited as necessary to ensure program integrity. The results of federal audits, where reported to the State, may also be applied in determining the audit adjustment for the ongoing rate study.

B. The labor data reported by providers shall be audited. Iii the event that facilities are inconsistently reporting their labor costs in the OSHPD data, the Department will adjust the data utilized to develop the labor index so that the correct amount will be reflected. If the labor data used in developing the labor index is adjusted, the State Plan will be amended to provide the specific methodology for such adjustments.

C. Reports of audits shall be retained by the State for a period of not less than five years, in accordance with 42 CFR 433.32.

D. Providers will have the right to appeal findings which result in an adjustment to program reimbursement or reimbursement rates. Specific appeal procedures are contained in Section 14171 of the Welfare and Institutions Code, and Article 1.5 (Provider Audit Appeals) of Title 22, California Code of Regulations. See Appendix 2.

* * * * *

DEPARTMENT OF HEALTH & HUMAN SERVICES

Centers for Medicare & Medicaid Services
San Francisco Regional Office
75 Hawthorne St., Suite 408
San Francisco, CA 94105

Apr - 5 2002

Gail l. Margolis, Deputy Director
Medical Care Services
Department of health Services
714 P Street, Room 1253
Sacramento, CA 95814

Dear Ms. Margolis;

Enclosed is a copy of California State plan amendment (SPA) No. 02-006, which we have approved effective August 1, 2002. This SPA clarifies what may be included as allowable costs for long term care, FQHCs/RHCs, and hospitals. Allowable costs may not include expenditures to assist, promote, or deter union organizing to the extent that such expenditures are paid by the provider with State funds.

Questions concerning this approval should be directed to Pat Daley at (415) 744-9592.

Sincerely,

Linda Minamoto
Associate Regional
Administrator
Division of Medicaid

IN THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

Case No. SACV02377 GLT (ANx)

The Chamber of Commerce of the United States, *et, al.*

Plaintiffs,

v.

Bill Lockyer in his capacity as Attorney General of the State of California, The Department of Health Services, Frank G. Vanacore as the Chief of the Audit Review and Analysis Section of the California Department of Health Services, and Diana M. Bontá, R.N., Dr., P.H. as the Director of the California Department of Health Services and Does 1 through 10,

Defendants,

and

American Federation of Labor and Congress of Industrial Organizations and California Labor Federal, AFL-CIO,

Intervenors.

DECLARATION OF FRANK VANACORE IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, PARTIAL SUMMARY JUDGMENT

DECLARATION OF FRANK VANACORE

I, FRANK VANACORE, declare and state as follows:

1. The following matters stated in this declaration are true of my personal knowledge.

2. I am the Chief of the Audit Review and Analysis Section of the Audits and Investigations program of the California Department of Health Services (Department). I have held this position since April 1, 1999. Prior to that, I was a field audit supervisor within the Financial Audits Branch field office in Sacramento. I held that position from April 1992 to April 1999.

3. The section I supervise is responsible for the issuance of Medi-Cal cost report forms that institutional providers are required to complete and return to the Department. The institutional providers to whom the Department sends these cost report forms are acute care hospitals, intermediate care facilities for the developmentally disabled (ICF/DDs), intermediate care facilities for the developmentally disabled-habilitative (ICF/DD-Hs), intermediate care facilities for the developmentally disabled-nursing (ICF-DD-Ns), federally qualified health centers (FQHCs), and rural health clinics. The California Office of Statewide Health Planning

and Development (OSHPD) is responsible for the distribution of Medi-Cal cost report forms that skilled nursing facilities (SNFs) and intermediate care facilities (ICFs) must complete and return to OSHPD. My section also follows up on the receipt and processing of all completed institutional cost reports that it distributes. This processing includes acceptance of the cost reports, auditing cost reports, and maintaining custody of the cost reports pending completion of the auditing process. My section also obtains the Medi-Cal cost reports that SNFs and ICFs submit to OSHPD. Auditors from Audits and Investigations audit these cost reports. The Department's Rate Development Branch then uses these audited costs for establishing reimbursement rates for these providers.

4. My section has also been responsible for sending certification forms to various providers that participate in the Medi-Cal program in order for these providers to certify, in accordance with California Government Code section 16645.7, that they will not use any state funds to assist, promote, or deter union organizing. To date, the Department has sent these forms to Medi-Cal participating long-term care providers, such as SNFs, ICFs, ICF/DDs, ICF/DD-Ns, ICF/DD-Hs, and to Medi-Cal participating FQHCs and rural health clinics.

5. the Medi-Cal program is California's Medicaid program. The program is paid for with both federal and state funds. On the other hand, the Medicare program is a purely federal program. To the best of my knowledge, the federal Medicare laws do not govern the Medicaid program. However, the federal Medicaid laws do govern the Med-Cal

program. I am not aware of anything in the federal Medicaid laws that obligates the Department to establish reimbursement rats for long-term care providers such as SNFs and ICF-DDs, or for acute care hospitals, in any particular manner. For example, to my knowledge, there is nothing in the federal Medicaid laws, that requires the Department to establish reimbursement rates for these providers based on the providers' costs, nor is there anything in the federal Medicaid laws that prohibits the Department from doing so. Moreover, to the extent that the Department has chosen to establish rates for these providers based, to some extent on provider costs, there is nothing in the federal Medicaid laws that I am aware of that governs which costs are allowable for any category of SNFs or ICF-DDs, for reimbursement or any other purpose. In summary, to the best of my knowledge, the federal Medicaid laws are silent as to the specific methodology the Department is to use in establishing reimbursement rates for long-term care providers and hospitals.

6. It is my understanding that there are some federal Medicaid laws which provide that the reasonable costs of FQHCs and rural health clinics, as determined in accordance with Medicare cost principles, are to play some role in the establishment of Medi-Cal reimbursement rates for services by these providers. While the federal Medicaid laws do not require the Department to use provider costs in establishing Medi-Cal rates for long-term care providers or acute care hospitals, the Department has chosen to use provider costs in the rate-setting process for long-term care providers and for some acute care hospitals. While no federal law requires the Department to do so, the Department's

longstanding policy has been to use federal Medicare rules in determining allowable costs that are used in the process of establishing reimbursement rates for long-term care providers and acute care hospitals. Audits from the Audits and Investigations program of the Department are responsible for conducting audits to determine the allowable costs of providers in order for that data to be used in the rate-setting process.

7. The United States Centers for Medicare and Medicaid Services (CMS) is the federal agency that administers both the federal Medicare and Medicaid programs. CMS was formerly known as the Health Care Financing Administration. CMS has adopted longstanding federal regulations and guidelines for determining whether costs are reasonable and allowable for reimbursement purposes under the federal Medicare program. These are the standards that Audits and Investigations applies in determining whether costs are reasonable and allowable for the purpose of setting reimbursement rates under the Medi-Cal program. Many of the specific guidelines that CMS has adopted are contained in the federal Medicare program's Provider Reimbursement Manual. Federal guidelines related to whether a provider's costs related to labor union activities are allowed are contained in sections 2180.1 through 2180.3 of the Provider Reimbursement Manual. These federal guidelines have been in effect for at twenty years according to the historical notes under each section. A true and correct copy of sections 2180.1 through 2180.3 of the Provider Reimbursement Manual is attached to this declaration as Exhibit A.

8. Section 2180.1 of the Provider Reimbursement Manual states that reasonable costs incurred by providers in activities consistent with the National Labor Relations Act (NLRA) may represent allowable costs of operations, "provided such costs are not directly related to influencing employees with respect to unionization." Section 2180.1 further states that "costs incurred for activities directly related to influencing employees respecting unionization or related to attempts to coerce employees or otherwise interfere with or restrain the exercise of employee rights under the NLRA are not allowable costs for program purposes. Such costs are unallowable whether such activities are performed directly by the provider or through an independent contractor, consultant or outside attorney."

9. California Government Code section 16645.7 requires certain private employers who make expenditures to assist, promote, or deter union organizing to maintain records sufficient to show that no state funds were used for those expenditures. Based on my experience in the audit field, I believe that Medi-Cal providers subject to this law can maintain a record of such expenditures without undue burden or cost to the provider. For example, a subsidiary general ledger account could be established to accumulate union related costs, either allowable and/or non-allowable. When a Medi-Cal cost report is prepared, it would be a simple matter to identify the non-allowable costs in this account and either exclude them from inclusion in the cost report, or if included, make an adjustment to remove them. As another example, the Department received e-mail correspondence from a representative of a provider regarding that provider's plans for complying with

Government Code section 16645.7. This person stated: "we propose to establish a separate general ledger account number and a separate line item as a contra-income account item in the 'other income' (donations and administrative income) section of our monthly interim financial statements. Then starting in May 2202, we can keep track of this kind of expense that we may incur. We will also highlight any expenses we incur as a footnote in our annual audited financial statements." A true and correct copy of this e-mail correspondence from this provider is attached to this declaration as Exhibit B.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at Sacramento, California, this 2nd day of August 2002.

/s/

FRANK VANACORE

* * * * *

REIMBURSEMENT FOR COSTS INCURRED IN RELATION TO UNION ACTIVITIES (Prov. Reimb. Man., Part I, § 2180)

[¶ 5999Z-55] Labor Union Organizing Activities (Prov. Reimb. Man. Part I, § 2180.1)

Reasonable costs incurred by providers in activities consistent with the National Labor Relations Act (NLRA) may present allowable costs of operation, provided such costs are not directly related to influencing employees with respect to unionization and further provided such costs are not unreasonable in amount. The NLRA imposes responsibilities and limitations on both management and labor. Management must have the knowledge and skill to deal with their employees and the wide range of labor relations issues in order to maintain an effective working environment. These rights and responsibilities of management encompass various activities such as written and oral communication with employees, consultations with attorneys or management advisors, and collective bargaining with union representatives. Unless the provider's activities are unauthorized or prohibited by the NLRA or these guidelines, or unless the costs incurred for such activities are unreasonable in amount or unnecessary, they will be allowable.

Reasonable costs incurred to keep employees informed of issues and to keep the lines of communication open between employees and employers are usually necessary and proper as they are part of the normal personal management and, therefore, may be allowable costs, provided such costs

are not directly related to influencing employees with respect to unionization.

Costs incurred for activities directly related to influencing employees respecting unionization or related to attempts to coerce employees or otherwise interfere with or restrain the exercise of employee rights under the NLRA are not allowable costs for program purposes. Such costs are unallowable whether such activities are performed directly by the provider or through an independent contractor, consultant or outside attorney.

With respect to allowable costs for services furnished, only the reasonable portion of the total costs incurred will be considered for reimbursement purposes. Expenses which are extraordinary in amount or kind, or unreasonably exceed expenditures common in the health care field for activities related to unionization, are not allowable costs.

Example: Reasonable costs incurred to furnish literature to employees or management personnel explaining their rights and responsibilities under the NLRA are allowable costs. Costs incurred to furnish literature designed to influence employees respecting unionization or to teach techniques for influencing employees respecting unionization are not allowable costs.

Example: Consultants and/or attorneys retained by a provider may be needed at times to familiarize supervisors and employees with labor laws. Therefore, reasonable costs incurred by a provider in seeking legal advice or counsel specifically on union activity matters, such as informing provider management and supervisory personnel regarding their legal rights and

responsibilities under the NLRA with regard to union organizing, are a necessary part of operations and are allowable costs.

Example: Reasonable costs incurred by a provider in providing training to supervisory personnel on union activity matters which is a part of normal personnel management are necessary and proper as part of the business operations of a provider and, therefore, are allowable costs, provided such training is not designed or timed to influence employees with respect to unionization.

Example: Provider activities which impact on wage or benefit programs, because they are designed to influence employees with respect to unionization, are not related to patient care and, therefore, are not allowable costs for Medicare program purposes.

* * * * *

.50 Manual revisions.—

Revision No. 261

[The following is the text of Trans. No. 261 (Jan. 1982):] Sec. 2180, *Reimbursement for Costs Incurred in Relation to Union Activities*, was added to the *Provider Reimbursement Manual* in June 1979 Transmittal No. 2180, to clarify our policy with respect to such costs. The policy statement articulated our view that reasonable costs incurred by a provider for collective bargaining and related activities are necessary to maintain the continued operation of the provider, and such costs are therefore related to patient care within the meaning of regulations at 42 CFR § 405.451. We also stated, however, that costs incurred for activities directly related to influencing employees respecting proposed

unionization (e.g., through furnishing literature to employees opposing union membership or training management to oppose unionization) are not sufficiently related to patient care and therefore may not be reimbursed.

At the request of a number of providers as well as hospital associations, we agreed to reexamine the policy expressed in § 2180, and on October 21, 1980, we published the § 2180 provisions in the *Federal Register*, 45 FR 69561, to solicit public comments on the policy. The *Federal Register* notice explained that comments from interested parties would be useful, since we had not had occasion o review the application of our general policy to factual situations.

In response to this notice, we received numerous comments which were summarized in a final notice published on January 16, 1981, 46 FR 3983. Having analyzed and reviewed the comments received, we concluded that further clarification of our policy was necessary, and we noted our intention to provide such clarification through a manual revision.

Since the January 1981 publication, review and consideration of the § 2180 policy statement and its practical application has continued. We recognize that the National Labor Relations Act (NLRA) guarantees certain rights to both employers and employees with respect to labor union organizing activates. Similarly, the NLRA imposes responsibilities and limitations on both management and labor. We also recognize the responsibility of HHS and of HCFA to establish policy not consistent with that established by the Congress in enacting the NLRA. In our January *Federal Register* notice, we

indicated that we had never intended the § 2180 policy statement to preclude reimbursement for reasonable costs associated with communicating "facts and opinions" about unionization efforts to provider employees, nor had we intended to preclude reimbursement for the reasonable cost of retaining consultants and attorneys to familiarize provider management and labor with provisions of the NLRA. These activities as well as those associated with the collective bargaining process are authorized by NLRA, and reasonable costs attributable thereto are legitimately related to efficient delivery of health care.

Given our policy that reasonable costs of distributing information to employees and obtaining outside consultation with respect to union organizing activities are allowable, we have been unable o devise an administratively practicable way of distinguishing the portion of such costs incurred "with the intent to influence employees." The attempt to draw such general distinctions places undue administrative burdens on fiscal intermediaries to analyze providers' motivations and allocate costs between those attributable to "persuasion" and those attributable to "information."

We have therefore decided to clarify our stated policy by revising § 2180.1 [¶ 5999Z-55] to acknowledge that reasonable costs incurred in connection with union organizing activities are related to patient care, including costs of informing employees of their rights and responsibilities under the NLRA, communicating management's position with respect to unionization, and obtaining advice and consultation of attorneys or consultants with respect to such activities. Costs claimed for activities

which are not authorized, or which are prohibited by the NLRA will continue to be disallowed as unreasonable and unrelated to the efficient delivery of needed health services. Additionally, costs that are excessive or that are incurred for unnecessary management activities will not be considered reasonable and will not be reimbursable under the Medicare program.

This revision constitutes a further clarification of existing policy. Costs reports subject to the reopening provisions specified in regulations at 42 CFR 405.1885 should be reopened where intermediaries had disallowed costs under Transmittal No. 218, dated June 1979, but which would be considered allowable and reasonable under this issuance.

* * * * *

Revision No. 309

[The following is the text of Trans. No. 309 (Apr. 1984):] Sec. 2180.1, *Labor Union Organizing Activities*, is revised pursuant to Section 107 of the Tax Equity and Fiscal Responsibility Act of 1982, which provides that costs incurred for activities directly related to influencing employees respecting unionization are not allowable costs for Medicare reimbursement purposes. Thus, these activities do not represent allowable costs for program purposes even through they may be acceptable activities under the Labor Management Reporting and Disclosure Act [sic] (LMRDA (P.L. 86-257)).

* * * * *

[¶ 5999Z-56] Collective Bargaining (Prov. Reimb. Man. Part I, § 2180.2)

Reasonable expenses incurred by a provider for collective bargaining and related activities, unless disallowed under Sec. 2180.1 [¶ 5999Z-55] are allowable costs, provided the activities are permitted by the NLRA. Contract negotiations and any procedures which flow from enforcement of contract terms, whether in a collective or individual setting, are necessary to maintain the continued operation of the provider, and, thus, are a precondition for the delivery of health services.

Example: The cost of the services of management's representative in food-faith collective bargaining activities is an allowable cost.

Example: Consultants and/or attorneys fees associated with collective bargaining activities in violation of the NLRA are not allowable costs.

* * * * *

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

Case No. 02-CV-377-GLT-(ANX)

THE CHAMBER OF COMMERCE OF THE UNITED STATES, *et al.*

Plaintiffs,

v.

BILL LOCKYER, *et al.*
Defendants,

AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS and CALIFORNIA LABOR FEDERATION, AFL-CIO,

Intervenors.

DECLARATION OF FRED AZCARATE IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

DECLARATION OF FRED AZCARATE

I, FRED AZCARATE, do hereby declare:

1. I am the Executive Director of Jobs with Justice and Jobs with Justice Education Fund.

2. Jobs with Justice Education Fund received a one-year grant in the year 2002 through

The New World Foundation. The New World Foundation sent me notification of this grant in a letter dated January 31, 2002. Enclosed with this letter was The New World Foundation's grantee agreement. The letter from The New World Foundation informed me that I was required to sign the grantee agreement in order to begin receiving payments. A true and correct copy of this letter and the enclosed grantee agreement is attached to this declaration as Exhibit A.

3. Jobs With Justice received a grant from The Solidago Foundation, Inc. in the year 2000. The Solidago Foundation informed me that, as a condition of receiving his grant, I was required to sign a grant agreement. A true and correct copy of this grant agreement is attached to this declaration as Exhibit B.

I declare under penalty of perjury under the laws of California and the United States that the foregoing is true and correct.

Executed on August 16, 2002 in Washington, D.C.

By: /s/

Fred Azcarate

January 31, 2002

Mr. Fred Azcarate
Jobs with Justice Education Fund
501 Third Street, NW
Washington, DC 20001

Dear Mr. Azcarate:

I am pleased to inform you that the Board of Directors of The New World Foundation has approved a grant from the Phoenix Fund of $15,000.000 for one year, FY '02, to Jobs with Justice Education Fund in support of its work.

Please note the conditions set forth in the enclosed grantee agreement and as an indication of your acceptance of these conditions, sign and return it so that payment can be initiated.

If you have any questions pertaining to your grant, Minnette Coleman, our Grant Administrator at (212) 497-3471 will be happy to assist you.

I join the Board in expressing enthusiasm for your efforts and satisfaction that the Foundation is able to provide support for your work.

With best wishes,

Colin Greer
The New World Foundation

THE NEW WORLD FOUNDATION

FY 2001 Grant# 02-64
Date Authorized; 1/29/2002

AGREEMENT BY GRANTEE

Grantee: Jobs with Justice Education Fund

Amount/Grant:$15,000.00
Period of Time for which grant is applicable: 1/29/2002 to 1/29/2003

This grant will be renewed for -0- additional year(s) if reports are properly filed and the renewal is approved by he President of The New World Foundation after staff has confirmed that the program is developing well.

Grant Payout Schedule

3/1/2002	$5,000.00		Scheduled
6/15/2002	$5,000.00		Scheduled
9/15/2002	$5,000.00		Scheduled

Grants for over $10,000 will be paid according to the above schedule with a minimum payment of $5,000 per period.

As a condition to the receipt of a grant in the amount of $15,000.00 made by the New World Foundation (the "Foundation"), the undersigned (the "Grantee") hereby agrees to the following:

1. Purpose: The grant is made for the following purpose:

in support of its work

2. Repayment:

The Grantee shall repay to the Foundation any portion of the amount granted which is not used for the purposes of the grant.

3. Reporting/Accounting

The Grantee shall submit to the Foundation full and complete reports on the manner in which the funds granted have been spent and the progress made in accomplishing the purpose of the grant. A full narrative report and financial statement are required. Such reports shall be furnished to the Foundation promptly at the close of the g rant period, (one calendar year from the date of the award). If the grant funds are in support of a particular project of the grantee organization, then the grantee shall submit a narrative and financial report showing income and expenditures for the project. The Grantee shall make its books and records available o the Foundation at reasonable times, if requested.

4. Prohibited Activities

The Grantee shall not use any of the grant funds:

- Except for the program represented in the application and for the purposes for which granted by the Board of Directors of the Foundation.

- For any activity or purpose which is prohibited by law, particularly as defined in the application sections of the Internal

Revenue Code and as consistent with the organization's particular tax exempt status.

5. Violations

It is understood that the Foundation has the right to withhold any future payments under this grant or any other grant to the Grantee in the event that it has any reason to believe that the Grantee has used the grant funds other than for the purpose for which granted, or has otherwise violated any of the provisions of this Agreement.

ORGANIZATION: Jobs with Justice Education Fund

SIGNED BY:

_____

TITLE: _____
DATE _____

Solidago Foundation, Inc. Grant Agreement

The Solidago Foundation Inc. (Grantor) has awarded a grant of $5000.00 to Jobs with Justice (Grantee). This grant is to be used for your project to develop and disseminate FTAA materials.

Grantee agrees and consents to the following conditions of the grant:

1. Grantee shall use the grant solely for the purposes stated above, and Grantee shall repay the Grantor any portion of the amount granted which is not used for the purposes of the grant;

2. Grantee shall submit to Grantor a one-year progress report describing the use of the funds and activities undertaken as a result of this grant by December 20, 2000. If all grant funds have not been expended in this period, a final report must be submitted after all funds are expended;

3. If the purpose of this grant is specified, Grantee shall show receipt of these grant funds separately on its books and all expenditures made in furtherance of the purposes of the grant shall appear on those books. Grantee shall make such books and records available to the Grantor at reasonable times. Grantee shall keep copies of all books and records and all reports to Grantor for at

least four years after completion of the use of the funds.

4. Grantee shall not use any portion of the funds granted herein to influence any campaign for public office, nor to make grants to individuals on a non-objective basis, nor to use the funds for any non-charitable or non-educational purpose.

IN WITNESS WHEREOF, this Grant Agreement is signed.

On 12/20/00
For Jobs With Justice
(Organization)

By. /s/
(Signature of Officer)

Fred Azcarate, Executive Director
(Print Name and Title)

Solidago Foundation, Inc.
25 Main Street
Suite 439
Northampton, MA 01060
Telephone: 413-587-0174 Fax: 413-587-0175

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

Case No. 02-CV-377-GLT-(ANX)

THE CHAMBER OF COMMERCE OF THE UNITED STATES, *et al.*,

Plaintiffs,

v.

BILL LOCKYER, *et al.*,

Defendants,

AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS and CALIFORNIA LABOR FEDERATION, AFL-CIO,

Intervenors.

DECLARATION OF NICHOLAS ROSS IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

DECLARATION OF NICHOLAS ROSS

Nicholas Ross does hereby declare:

1. I am a certified public accountant and the Partner-in-Charge for the Los Angeles Area Office of Thomas Havey LLP.

2. Thomas Havey LLP is a national CPA firm with approximately 40 partners and 400 staff

members. The Firm specializes in serving the accounting and auditing needs of not-for-profit organizations. About 70 percent of our practice is devoted to these types of organizations. One of the services the Firm provides is assistance to organizations in establishing internal accounting controls and procedures so the organizations can comply with applicable legal requirements.

3. I have worked at Thomas Havey LLP (or the predecessor merged firm Lindquist and Company) since 1985. I have served as engagement partner for the audits of many not-for-profit organizations, and I have been responsible for the planning, supervision and review of these audit engagements. I have a Bachelor of Arts degree and a Master of Business Administration degree from the University of California at Berkeley.

4. I have been informed that under a California Law, which is popularly known as "AB 1889" and is codified at California Government Code sections 16645-49, entities that receive funds from the State of California through grants or contracts, or on account of their participation in state programs, are prohibited from using those, state funds to "assist, promote or deter union organizing."

5. I have also been informed that entities that receive state funds and make expenditures to "assist, promote or deter union organizing" are required by AB 1889 to "maintain records sufficient to show that state funds have not been used for those expenditures," but that nothing in AB 1889 "requires employers to maintain records in any particular form." I have also been informed that AB 1889 prohibits the use of state funds "to reimburse a state

contractor for any costs incurred to assist, promote or deter union organizing." I have been provided with a copy of AB 1889 and have reviewed the statute, including its definitional sections. I have been informed that no regulations have been issued to impose additional requirements for compliance with AB 1889,

6. The accounting and recordkeeping requirements imposed by AB 1889 with regard to state funds are similar to requirements imposed in other contexts, particularly for federal grant recipients. Entities that receive federal grants are generally required to have, among other things: 1) accurate, current and complete financial information for federal awards, 2) effective control over and accountability for all federal assets, 3) controls that assure that assets are used only for authorized purposes, and 4) accounting records that identify the source and use of the federal funds.

7. Requirements with which federal grant recipients generally must comply are set out in the following Circulars issued by the federal Office of Management and Budget (OMB): OMB Circular A-110, "Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals and Other Non-Profit Organizations"; OMB Circular A-122, "Cost Principles for Non-Profit Organizations," and OMB Circular A-133, "Audits of Institutions of States, Local Governments, and Non-Profit Organizations." True and correct copies of these OMB Circulars are attached to this declaration as Exhibits A, B and C.

8. The accounting and recordkeeping requirements imposed by AB 1889 appear to be

significantly less burdensome than the detailed requirements for federal grant recipients set out in the aforementioned OMB Circulars. AB 1889 states that employers need not "maintain records in any particular form," and AB 1889 does not require the filing of periodic reports, so entities that must comply with AB 1889 would have flexibility in establishing proper accounting procedures and controls.

I declare under penalty of perjury under the laws of the United States and the State of California that the foregoing is true and correct.

Executed this 19 th day of August 2002 at Brea, California.

By: /s/

Nicholas Ross

OFFICE OF MANAGEMENT AND BUDGET

CIRCULAR A-110

(REVISED 11/19/93, As Further Amended 9/30/99)

TO THE HEADS OF EXECUTIVE DEPARTMENTS AND ESTABLISHMENTS

SUBJECT: Uniform Administrative Requirements for Grants and Agreements With Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations

1. **Purpose**. This Circular sets forth standards for obtaining consistency and uniformity among Federal agencies in the administration of grants to and agreements with institutions of higher education, hospitals, and other non-profit organizations.

2. **Authority**. Circular A-110 is issued under the authority of 31 U.S.C. 503 (the Chief Financial Officers Act), 31 U.S.C. 1111, 41 U.S.C. 405 (the Office of Federal Procurement Policy Act), Reorganization Plan No. 2 of 1970, and E.O. 11541 ("Prescribing the Duties of the Office of Management and Budget and the Domestic Policy Council in the Executive Office of the President").

3. **Policy**. Except as provided herein, the standards set forth in this Circular are applicable to all Federal agencies. If any statute specifically prescribes policies or specific requirements that differ from the standards provided herein, the provisions of the statute shall govern.

The provisions of the sections of this Circular shall be applied by Federal agencies to recipients. Recipients shall apply the provisions of this Circular to subrecipients performing substantive work under grants and agreements that are passed through or awarded by the primary recipient, if such subrecipients are organizations described in paragraph 1.

This Circular does not apply to grants, contracts, or other agreements between the Federal Government and units of State or local governments covered by OMB Circular A-102, "Grants and Cooperative Agreements with State and Local Governments," and the Federal agencies' grants management common rule which standardized and codified the administrative requirements Federal agencies impose on State and local grantees. In addition, subawards and contracts to State or local governments are not covered by this Circular. However, this Circular applies to subawards made by State and local governments to organizations covered by this Circular. Federal agencies may apply the provisions of this Circular to commercial organizations, foreign governments, organizations under the jurisdiction of foreign governments, and international organizations.

* * * * *

(b) After closeout of an award, a relationship created under an award may be modified or ended in whole or in part with the consent of the Federal awarding agency and the recipient, provided the responsibilities of the recipient referred to in paragraph ___.73(a), including those for property management as applicable, are considered and

provisions made for continuing responsibilities of the recipient, as appropriate.

___.73 Collection of amounts due.

(a) Any funds paid to a recipient in excess of the amount to which the recipient is finally determined to be entitled under the terms and conditions of the award constitute a debt to the Federal Government. If not paid within a reasonable period after the demand for payment, the Federal awarding agency may reduce the debt by (1), (2) or (3).

(1) Making an administrative offset against other requests for reimbursements.

(2) Withholding advance payments otherwise due to the recipient.

(3) Taking other action permitted by statute.

(b) Except as otherwise provided by law, the Federal awarding agency shall charge interest on an overdue debt in accordance with 4 CFR Chapter II, "Federal Claims Collection Standards."

Appendix A

Contract Provisions

All contracts, awarded by a recipient including small purchases, shall contain the following provisions as applicable:

1. Equal Employment Opportunity - All contracts shall contain a provision requiring compliance with E.O. 11246, "Equal Employment Opportunity," as amended by E.O. 11375, "Amending Executive Order 11246 Relating to Equal Employment Opportunity," and as supplemented by regulations at 41 CFR part 60, "Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor."

2. Copeland "Anti-Kickback" Act (18 U.S.C. 874 and 40 U.S.C. 276c) - All contracts and subgrants in excess of $2000 for construction or repair awarded by recipients and subrecipients shall include a provision for compliance with the Copeland "Anti-Kickback" Act (18 U.S.C. 874), as supplemented by Department of Labor regulations (29 CFR part 3, "Contractors and Subcontractors on Public Building or Public Work Financed in Whole or in Part by Loans or Grants from the United States").

* * * * *

6. Clean Air Act (42 U.S.C. 7401 et seq.) and the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.), as amended - Contracts and subgrants of amounts in excess of $100,000 shall contain a provision that requires the recipient to agree to comply with all applicable standards, orders or regulations issued pursuant to the Clean Air Act (42 U.S.C. 7401 et seq.) and the Federal Water Pollution

Control Act as amended (33 U.S.C. 1251 et seq.). Violations shall be reported to the Federal awarding agency and the Regional Office of the Environmental Protection Agency (EPA).

7. Byrd Anti-Lobbying Amendment (31 U.S.C. 1352) - Contractors who apply or bid for an award of $100,000 or more shall file the required certification. Each tier certifies to the tier above that it will not and has not used Federal appropriated funds to pay any person or organization for influencing or attempting to influence an officer or employee of any agency, a member of Congress, officer or employee of Congress, or an employee of a member of Congress in connection with obtaining any Federal contract, grant or any other award covered by 31 U.S.C. 1352. Each tier shall also disclose any lobbying with non-Federal funds that takes place in connection with obtaining any Federal award. Such disclosures are forwarded from tier to tier up to the recipient.

8. Debarment and Suspension (E.O.s 12549 and 12689) - No contract shall be made to parties listed on the General Services Administration's List of Parties Excluded from Federal Procurement or Nonprocurement Programs in accordance with E.O.s 12549 and 12689, "Debarment and Suspension." This list contains the names of parties debarred, suspended, or otherwise excluded by agencies, and contractors declared ineligible under statutory or regulatory authority other than E.O. 12549.

Contractors with awards that exceed the small purchase threshold shall provide the required certification regarding its exclusion status and that of its principal employees.

* * * * *

OFFICE OF MANAGEMENT AND BUDGET

CIRCULAR NO. A-122 Revised

TO THE HEADS OF EXECUTIVE DEPARTMENTS AND ESTABLISHMENTS

SUBJECT: Cost Principles for Non-Profit Organizations

1. **Purpose**. This Circular establishes principles for determining costs of grants, contracts and other agreements with non-profit organizations. It does not apply to colleges and universities which are covered by Office of Management and Budget (OMB) Circular A-21, "Cost Principles for Educational Institutions"; State, local, and federally-recognized Indian tribal governments which are covered by OMB Circular A-87, "Cost Principles for State, Local, and Indian Tribal Governments"; or hospitals. The principles are designed to provide that the Federal Government bear its fair share of costs except where restricted or prohibited by law. The principles do not attempt to prescribe the extent of cost sharing or matching on grants, contracts, or other agreements. However, such cost sharing or matching shall not be accomplished through arbitrary limitations on individual cost elements by Federal agencies. Provision for profit or other increment above cost is outside the scope of this Circular.

2. **Supersession**. This Circular supersedes cost principles issued by individual agencies for non-profit organizations.

3. **Applicability.**

a. These principles shall be used by all Federal agencies in determining the costs of work performed by non-profit organizations under grants, cooperative agreements, cost reimbursement contracts, and other contracts in which costs are used in pricing, administration, or settlement. All of these instruments are hereafter referred to as awards. The principles do not apply to awards under which an organization is not required to account to the Federal Government for actual costs incurred.

b. All cost reimbursement subawards (subgrants, subcontracts, etc.) are subject to those Federal cost principles applicable to the particular organization concerned. Thus, if a subaward is to a non-profit organization, this Circular shall apply; if a subaward is to a commercial organization, the cost principles applicable to commercial concerns shall apply; if a subaward is to a college or university, Circular A-21 shall apply; if a subaward is to a State, local, or federally-recognized Indian tribal government, Circular A-87 shall apply.

* * * * *

e. Fixed rates may be negotiated where predetermined rates are not considered appropriate. A fixed rate, however, shall not be negotiated if (i) all or a substantial portion of the organization's awards are expected to expire before the carry-forward

adjustment can be made; (ii) the mix of Federal and non-Federal work at the organization is too erratic to permit an equitable carry-forward adjustment; or (iii) the organization's operations fluctuate significantly from year to year.

f. Provisional and final rates shall be negotiated where neither predetermined nor fixed rates are appropriate.

g. The results of each negotiation shall be formalized in a written agreement between the cognizant agency and the non-profit organization. The cognizant agency shall distribute copies of the agreement to all concerned Federal agencies.

h. If a dispute arises in a negotiation of an indirect cost rate between the cognizant agency and the non-profit organization, the dispute shall be resolved in accordance with the appeals procedures of the cognizant agency.

i. To the extent that problems are encountered among the Federal agencies in connection with the negotiation and approval process, OMB will lend assistance as required to resolve such problems in a timely manner.

ATTACHMENT B
Circular No. A-122
SELECTED ITEMS OF COST

Table of Contents

1. Advertising and public relations costs
2. Alcoholic beverages
3. Bad debts
4. Bid and proposal costs (reserved)
5. Bonding costs
6. Communication costs
7. Compensation for personal services
8. Contingency provisions
9. Contributions
10. Defense and prosecution of criminal and civil proceedings, claims, appeals and patent infringement
11. Depreciation and use allowances
12. Donations
13. Employee morale, health, and welfare costs and credits
14. Entertainment costs
15. Equipment and other capital expenditures
16. Fines and penalties
17. Fringe benefits
18. Goods or services for personal use
19. Housing and personal living expenses
20. Idle facilities and idle capacity
21. Independent research and development (reserved)
22. Insurance and indemnification
23. Interest, fund raising, and investment management costs

24. Labor relations costs
25. Lobbying
26. Losses on other awards
27. Maintenance and repair costs
28. Materials and supplies
29. Meetings and conferences
30. Memberships, subscriptions, and professional activity costs
31. Organization costs
32. Overtime, extra-pay shift, and multi-shift premiums
33. Page charges in professional journals
34. Participant support costs
35. Patent costs
36. Pension plans
37. Plant security costs
38. Pre-award costs
39. Professional service costs
40. Profits and losses on disposition of depreciable property or other capital assets
41. Publication and printing costs
42. Rearrangement and alteration costs
43. Reconversion costs
44. Recruiting costs
45. Relocation costs
46. Rental costs
47. Royalties and other costs for use of patents and copyrights
48. Selling and marketing
49. Severance pay
50. Specialized service facilities
51. Taxes
52. Termination costs
53. Training and education costs
54. Transportation costs

55. Travel costs
56. Trustees

ATTACHMENT B
Circular No. A-122
SELECTED ITEMS OF COST

Paragraphs 1 through 56 provide principles to be applied in establishing the allowability of certain items of cost. These principles apply whether a cost is treated as direct or indirect. Failure to mention a particular item of cost is not intended to imply that it is unallowable; rather, determination as to allowability in each case should be based on the treatment or principles provided for similar or related items of cost.

* * * * *

d. Fundraising and investment activities shall be allocated an appropriate share of indirect costs under the conditions described in **subparagraph B.3 of Attachment A.**

24. **Labor relations costs**. Costs incurred in maintaining satisfactory relations between the organization and its employees, including costs of labor management committees, employee publications, and other related activities are allowable.

25. **Lobbying**.

a. Notwithstanding other provisions of this Circular, costs associated with the following activities are unallowable:

(1) Attempts to influence the outcomes of any Federal, State, or local election, referendum, initiative, or similar procedure, through in kind or cash contributions, endorsements, publicity, or similar activity;

(2) Establishing, administering, contributing to, or paying the expenses of a political party, campaign, political action committee, or other organization established for the purpose of influencing the outcomes of elections;

(3) Any attempt to influence: (i) The introduction of Federal or State legislation; or (ii) the enactment or modification of any pending Federal or State legislation through communication with any member or employee of the Congress or State legislature (including efforts to influence State or local officials to engage in similar lobbying activity), or with any Government official or employee in connection with a decision to sign or veto enrolled legislation;

(4) Any attempt to influence: (i) The introduction of Federal or State legislation; or (ii) the enactment or modification of any pending Federal or State legislation by preparing, distributing or using publicity or propaganda, or by urging members of the general public or any segment thereof to contribute to or participate in any mass demonstration, march, rally, fundraising drive, lobbying campaign or letter writing or telephone campaign; or

(5) Legislative liaison activities, including attendance at legislative sessions or committee hearings, gathering information regarding legislation, and analyzing the effect of legislation, when such activities are carried on in support of or in knowing preparation for an effort to engage in unallowable lobbying.

* * * * *

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

Case No. SAC V02377GLT(ANx)

The Chamber of Commerce of the United States, California Chamber of Commerce Employers Group, California Healthcare Association, California Manufacturers and Technology Association, California Association of Health Facilities, California Association of Homes & Services for the Aging, Bettec Corporation, Marksherm Corporation, Zilaco, Inc., Zilaco Del Rio Healthcare Inc., Beverly Health & Rehabilitation Services, Inc. dba Beverly Manor -- Costa Mesa, Internext Group,

Plaintiffs,

v.

Bill Lockyer in his capacity as Attorney General of the State of California, The Department of Health Services, Frank G. Vanacore as the Chief of the Audit Review and Analysis Section of the California Department of Health Services, and Diana M. Bontá, R.N., Dr., P.H. as the Director of the California Department of Health Services and DOES 1 through 10,

Defendants.

DECLARATION OF DARRYL NIXON

I, Darryl Nixon, declare and state as follows:

1. I am the Director of Reimbursement for the California Association of Health Facilities ("CAHF"), a non-profit association representing long-term care providers in California. I have personal knowledge of the facts recited herein, and if called to testify concerning them under oath, I could and would competently testify thereto.

2. I received a B.A. in Business Administration with a concentration in Accounting from California State University, Fullerton in January 1973.

3. Prior to my employment with CAHF, I spent twenty-five years working for the State of California, in various positions.

4. In 1976, I began working at the Department of Health Services for the State of California ("DHS"). I spent over twenty-two years with the DHS in a variety of positions, including Health Program Auditor, Audit Supervisor, Audit Manager, Medi-Cal Field Office Administrator and Branch Chief positions in the Medi-Cal Operations and Medi-Cal Policy Divisions.

5. Based on my education and experience, I am knowledgeable about the audit, financial, and program policy aspects of the Medi-Cal Program and the laws, rules, and regulations governing the Medi-Cal Program and am fully qualified to make this declaration.

6. As Director of Reimbursement for CAHF, my duties include tracking and monitoring all State Plans and State Plan Amendments ("SPAs")

submitted by the State pursuant to its participation in the Medicaid Program and tracking and analyzing provider costs and Medicare and Medi-Cal patient days.

7. CAHF is an association representing an extremely diverse membership, including approximately 1,600 licensed skilled nursing facilities ("SNFs"), intermediate care facilities ("ICFs"), intermediate care facilities for the developmentally disabled ("ICF/DDs"), intermediate care facilities for the developmentally disabled/habilitative ("ICF/DD-Hs"), intermediate care facilities for the developmentally disabled/nursing ("ICF/DD-Ns"), and intermediate care facilities for the developmentally disabled/continuous nursing ("ICF/DD-CNs"). While CAHF represents member organizations that are organized as both "for profit" and "not for profit" entities, the majority of its membership operates long-term care facilities organized as "for profit" entities. CAHF members employ approximately 72,000 employees. CAHF's membership is extremely diverse in terms of size, location case mix, patient type, and licensure status.

8. Also as part of my job as Reimbursement Director for CAHF, I coordinate the processing by CAHF of data for long-term care facilities from the Office of Statewide Health Planning and Development ("OSHPD") and DHS. OSHPD compiles and stores financial and utilization data for all long-term care facilities with the exception of ICF/DD-Hs and ICF/DD-Ns. DHS receives similar data for ICF/DD-Hs and ICF/DD-Ns and provides this data to CAHF, who processes the

data and retains a database containing this information. From the OSHPD and DHS data, CAHF performs "rate runs" which provide detailed information regarding the Medi-Cal reimbursement to health care providers. By analyzing this data, CAHF can determine such reimbursement information as the percentage of Medi-Cal patient days at particular long-term care facilities in California.

9. Attached hereto as Exhibit A is a true and correct copy of a query summary from the OSHPD data concerning the reimbursement of SNFs in California. As the chart demonstrates, the dependence of free-standing SNFs on the Medi-Cal program varies significantly. For example, approximately 20% of free-standing SNFs are dependent on the Medi-Cal program for 89% or more of their reimbursement. Moreover, CAHF represents 60 SNFs which are 90% or more dependent on the Medi-Cal program.

10. Attached hereto as Exhibit B is a true and correct copy of a query summary from the DHS data concerning the reimbursement of ICF/DD-Hs and ICF/DD-Ns. As the chart demonstrates, ICF/DD-Hs and ICF/DD-Ns are heavily dependent on the Medi-Cal program. According to the DHS data, approximately 94% of ICF/DD-Ns and ICF/DD-Hs are 99-100% dependent on the Medi-Cal program. In other words, 94% of ICF/DD-Ns and ICF/DD-Hs have no other resources than funds received through the Medi-Cal program. Moreover, CAHF represents 505 (which is nearly 33% of CAHF members) ICF/DD-Hs and ICF/DD-Ns which are 100% dependent on the Medi-Cal program.

11. Attached hereto as Exhibit C is a true and correct copy of a query summary from the OSHPD data concerning the reimbursement of Bay Crest Care Center, Brier Oak Terrace Care Center, and Royalwood Care Center. As the chart demonstrates, these three facilities have drastically different percentages of Medi-Cal patient days than the ICF/DD-Ns and ICF/DD-Hs referenced in paragraph 10 and than the 20% of free-standing SNFs referenced in paragraph 9. The percentage of dependence on the Medi-Cal program for these three facilities during 1999 through 2001 ranged from 48.7% to 78.9%.

12. I have reviewed the declarations submitted by the State in its moving papers regarding the submission of a SPA. I am not aware of any public notice provided during the filing and ultimate approval of this SPA. -

I declare under penalty of perjury under the laws of the United States and that the foregoing is true and correct. -

EXECUTED on this 16th day of August, 2002, at Sacramento County, California.

/s/

Darryl Nixon

NATIONAL LABOR RELATIONS BOARD
Office of the General Counsel
Washington, D.C. 20570

For Immediate Release

Monday, November 19, 1999

NLRB General Counsel Fred Feinstein Issues Report on Organizational and Casehandling Developments and Recurring Legal Themes During His Tenure Since March 1994

* * * * *

In a supplemental post-argument brief, I took the further position that a finding of joint employer status for the purpose of imposing a bargaining obligation should not require the consent of all of the joint employers. Instead I urged the Board to simply apply a traditional "community of interest" analysis and to find an appropriate unit whenever such community exists and any one of the joint employers exercises sufficient control over all employees that the enterprise cannot be said to consist of "competing" employers. The Board has not yet ruled on these cases.

"Neutrality" Agreements

Partly in response to some of these trends, unions have begun to make greater efforts to obtain "neutrality agreements" during organizing campaigns or in collective-bargaining agreements. Such agreements include not only traditional "*Kroger* clauses"-requiring recognition and applying the contract at newly-acquired or opened facilities based

on a showing of majority support-but also other agreements designed to facilitate success in organizing. For example, unions have begun to seek employer waivers of their Lechmere rights to deny, consistent with state law, access to their property to union organizers; as well as employer agreements to provide names and addresses of employees at the start of an organizing campaign, and to refrain from exercising their §8(c) right to express their views about unionization.

The issues raised by these kinds of union proposals are ones of first impression, as there is no Board decision expressly approving or condemning them. One of the most important questions is whether such provisions are mandatory or permissive subjects of bargaining-that is, can unions insist to impasse or even take economic action to obtain them?

In one case, *Sahara Hotel*, I issued a complaint alleging that the union unlawfully insisted to impasse on an access clause, an employer no-speech provision, and a provision requiring disclosure of employee names and addresses on the ground that they were permissive subjects of bargaining. That is, those provisions would settle no terms and conditions of employment of unit employees but would merely further the union's own institutional interests by facilitating the organizing of unorganized employees. However, I also instructed the Regional Office to argue that two of those provisions, the access and roster provisions, should be considered mandatory subjects, upon which the union lawfully could insist, because they were merely mechanisms for implementing the parties' "after-acquired" Kroger

clause, which is well settled to be a mandatory subject of bargaining. That is, since the union may lawfully insist to impasse on a Kroger clause, it should be able to insist to impasse on the procedures to be used—e.g., providing names and/or access-to facilitate its implementation. The case never reached the Board because the parties settled their dispute. But, as neutrality proposals become more prevalent, the Board wilt ultimately need to address these issues. A detailed treatment of this case can be found in my Case Handling Report dated November 20, 1996 (http://www.nlrb.gov/press/r2l84.html)

Other Issues

A number of other issues that have come before me have had their origins in recent changes in the relationship between employers and employees. These include the circumstances under which an employer can withdraw recognition from an incumbent union; the status of graduate teaching assistants; efforts by employers to condition employment or benefits on employees' agreement to submit certain workplace disputes to arbitration and other forms of ADR.

* * * * *

Assembly Committee On Labor and Employment
Darrell Steinberg, Chairman

BACKGROUND INFORMATION

Measure: AB 1889

Author: Assembly Member Cedillo

1. Origin of the bill

   a. Who is the source of the bill? What person, organization, or governmental entity requested introduction?
   California Labor Federation, AFL-CIO

   b. Has a similar bill been before either this session or a previous session of the legislature? If so, please identify the session, bill number and disposition of the bill.
   Yes, AB 442 (Cedillo) 1999-2000 Regular Session

   c. Has there been an interim committee report on the bill? If so, please identify the report.
   No

2. What is the problem or deficiency in the present law which this bill seeks to remedy?
   Nothing in existing law prohibits recipients of state funds from using the funds to encourage or discourage unionization.

3. Please attach copies of any background material in explanation of the bill, or state where such material is available for reference by committee staff.
See attached.

4. Please attach copies of letters of support or opposition from any group, organization, or governmental agency who has contacted you either in support or opposition to the bill.

5. If you plan substantive amendments to this bill prior to the hearing, please explain briefly the substance of the amendments to be prepared.
The sponsors will propose amendments to the author at a meeting on April 5, 2000. They should only be technical in nature.

6. List the witnesses you plan to have testify.

Tom Rankin, California Federation of Labor, AFL-CIO
Alan Davenport, Service Employees International Union
Barry Broad, International Brotherhood of Teamsters

RETURN THIS FORM TO: Assembly Committee On Labor and Employment, Phone (916) 319-2091 – Brenda K. Heizer – LOB, Room 155

STAFF PERSON TO CONTACT: Dan Savage 319-2046

California Association of Nonprofits
215 West 9th Street
Los Angeles, CA 90015

April 27, 2000

The Honorable Gil Cedillo
California State Assembly
State Capitol
Sacramento, CA 95814

Re: AB 1889 (Cedillo) State funds: unionization

Status: Assembly Appropriations Committee

Dear Assemblyman Cedillo:

The CAN Nonprofit Policy Council (NPC) is the public policy project of the California Association of Nonprofits (CAN). The California Association of Nonprofits is committed to maintaining the strength and diversity of the states nonprofit sector. The California Association of Nonprofits' 1800 members represent the spectrum of nonprofits - from health care to child care, social justice, legal aid and the religious sector.

This bill would impose an unreasonable burden on nonprofits to avoid a potential violation of the bill. Nonprofits that receive contracts and/or grants from the state of California are not allowed to use those funds for anything other than the stated purpose of the contract and/or grant. Nonprofits receiving state funding are carefully monitored to make sure they do not use funds for not allowed purposes.

This bill would also impose an unreasonable burden on nonprofits in that they would have to maintain duplicate minutely detailed records to track funds received from the state. They are already required to do that by the governmental agency from monitoring the contract. It would be expensive and unreasonable to ask them to keep additional records to prove they were not engaging in an activity for which they cannot use the funds in the first place.

AB 1889 also has the potential to significantly increase litigation costs by providing countless opportunities for unhappy employees to file civil actions merely in an effort to harass employers. Nonprofit organizations have minimal income to begin with. To add the possibility of litigation, particularly when it would be for an activity they cannot engage in the first place, seems unreasonable and could threaten the very existence of individual nonprofit organizations.

* * * * *

California Labor Federation

April 6, 2000

Assemblyman Darrell Steinberg
Chair, Assembly Labor and Employment Committee
State Capital, Room 2176
Sacramento, CA 95814

RE: AB 1889 (Cedillo) – SUPPORT

Dear Assemblyman Steinberg:

The California Labor Federation, AFL-CIO, supports AB 1889 (Cedillo), which would require state neutrality in union representation campaigns by prohibiting the use of state funds and facilities to assist, promote or deter union organizing.

Currently recipients of state funds, including those who receive reimbursements or grants and those who engage in service contracts, are permitted to use those state funds to assist, promote or deter organizing. We believe that use of state funds in this manner is a misuse of taxpayer funds.

Numerous federal statutes prohibit federal funds from being used to influence employees' choices regarding union representation. For example, the Job Training Partnership Act, the Workforce Investment Act, the National Community Service Act and the Head Start Programs Act all provide that funds or assistance shall not be used to "assist, promote or deter union organizing". Proposed regulations implementing the Federal Acquisition

Act also would prohibit taxpayer monies from influencing an employee's decision whether to choose representation.

AB 1889 would ensure that the power and resources of the state will not be used to deprive employees their right to choose or not choose a union. The bill will benefit the state in two principal ways. First, AB 1889 would ensure that state funds are not wasted on expensive worker campaigns and that employers who wish to wage a pro-union or anti-union campaign would have to use their own monies to do so. Second, it would save the state the loss of productivity on state funded projects that result from the work interruptions and labor conflicts often associated with anti-union campaigns.

We urge you to vote "YES" on AB 1889 when it comes before you in the Assembly Labor and Employment Committee on Wednesday, April 12, 2000.

Sincerely,

/s/

Tom Rankin
President

Cc: Committee Members
Assemblyman Gil Cedillo

Organizing Experiences Under Union-Management Neutrality and Card Check Agreements

Report to the Institute for the Study of Labor Organizations, George Meany Center for Labor Studies

February 1999

Adrienne E. Eaton
Labor Studies & Employment Relations Dept.
Labor Education Center
Rutgers University
50 Labor Center Way
New Brunswick, NJ 08901-8553

Jill Kriesky
Institute for Labor Studies and Research
West Virginia University
710 Knapp Hall
Morgantown, WV 26506

Executive Summary

This study summarizes the results of a study of approximately 114 neutrality and card check agreements. The main findings in each area are listed below

Coverage of Agreements. The typical neutrality/card check agreement is negotiated between a single union and a major employer in a national or regional agreement and contains limitations on the types of workers covered.

- Over half of the agreements studied were negotiated in centralized, company-wide national negotiations.

- A small number of these agreements are with multiple employers.

- Two-thirds of the agreements contain exclusions of significant numbers of unorganized workers, based on occupations, facilities and businesses or both.

- Most agreements have only one union signatory. Language varies as to whether or not organizing by additional unions is covered.

Negotiation of Agreements. Neutrality and card check agreements are a relatively new phenomenon, negotiated both within and outside of contracts using sources of leverage ranging from union-management collaboration to high-profile public campaigns against employers.

- Although a few agreements are roughly 20 years old, more than 3/4 were negotiated in the 1990s.

- The sources of leverage used to obtain these agreements are complex and difficult to disentangle. Thirty two of the agreements have been bargained in the context of a formal labor-management partnership. Another common source of leverage was through the public sector, making use of political ties and/or government regulations to pressure the employer.

- The majority of the agreements were found in side

letters, memoranda or appendices to the contract. Close 1020% existed outside of any existing bargaining agreement or relationship at all.

- The initial language negotiated is rarely ideal from the union's perspective. Most of the agreements have not been renegotiated. Of those that have been, the majority have been improved from the union's standpoint.

Language. Although wide variation exists in the definition of neutrality and methods used to enforce the language, most agreements specify the use of the card check to determine union status.

- Almost 3/4 of the agreements call for card check. The card check is typically triggered by a simple majority although some agreements require as much as 65% of the unit to have signed cards.

- The definition of neutrality varies quite widely from very general statements to very specific fists of tactics prohibited.

- Roughly 40% of agreements require the employer to send the union a fist of employees.

- 2/3 of agreements give the union physical access to the employer's property for purposes of organizing.

- More than 3/4 of agreements set limits on union behaviors in organizing, including prohibitions of verbal attacks on management, time limits on and advance notice of organizing drives.

- Some form of dispute resolution is called for in

over 90% of the agreements. Almost all card check agreements require the card check to be conducted by a neutral third party. For other types of disputes, including compliance with neutrality, approximately 85% had some form of dispute resolution. A little over 10% called for a joint labor-management panel as the final step for this type of dispute.

- Language that addresses the bargaining process that is to follow successful organizing exists but is relatively rare. About 1/3 of agreements mention accretion. Arbitration of first agreements is called for in only a few cases, all of which involve a single international union.

- A cutting edge area of language is the company's commitment to pressure suppliers or other firms with which it has a relationship to also implement neutrality or card check.

Organizing Experience. Neutrality/card check agreements have, indeed, produced significant organizing successes.

- Almost 90% of the unions have tested the language they have negotiated by initiating an organizing drive.

- 255 separate campaigns were identified resulting from 92 of the 113 agreements. 180 of these resulted in recognition by the employer.

- The overall success rate was 70.6%. The average success rate across individual agreements was 72.8%.

- First contracts followed recognition in almost all cases.

Management Violations. Neutrality/card check agreements have not wiped out management's use of anti-union campaign tactics.

- Unions alleged management violations of the agreements about 60% of the time.

- Legal and illegal anti-union campaign tactics (discharge of union supporter, hiring a consultant, captive audience meetings, supervisor one-on-one campaigns, promises of wage increases or other improvements) were used but at a much lower rate than is common in the private sector.

- Some violations were specific to the provisions of the neutrality agreement: Some employers denied coverage of particular groups of workers while others failed to turn over accurate or timely lists to the union.

- Many of the violations are committed by local managers who corporate-level managers are unable or unwilling to control.

Union Tactics. Unions organizing under neutrality/card check agreements have altered their campaign methods in various ways, but they violate the agreements far less frequently than management.

- Management alleged union violations of the agreement relatively rarely (12.5% of cases) but the allegations often triggered management antiunion campaigns.

- Almost 3/4 of the individual union respondents reported that the agreement had affected union organizing tactics, but the nature of the impact varied widely. Many unions avoid attacking the employer and emphasize instead a positive message about the union.

Explaining Success. Statistical analysis of successful campaigns offers several insights into the specific neutrality conditions which can help improve the union "win rate" in organizing.

- Success is defined by the percentage of organizing drives ending in recognition.

- Higher success rates are associated with

    - card check but not neutrality alone

    - union access to fists of workers

    - some form of dispute resolution

    - no management violations (success rates approach 100% in the absence of management violation)

    - no alleged union violations

    - simpler (single unit) bargaining structures or agreement coverage

    - the initial leveraging of the agreement through political ties and/or government regulatory processes

Questions for the Future. This study is the first comprehensive look at neutrality and card check agreements; additional research will enhance our understanding of their effectiveness, in particular we need to know more about:

- How to develop effective mechanisms to prevent local managers from violating agreements within corporate-wide, multi-site agreements.

- How to develop better, more effective remedies for management violations

Introduction

A long stream of industrial relations research has identified employer opposition as a key variable in explaining both union losses in certification elections and, ultimately, in the overall decline of unionization in the U.S. (Dickens 1983, Freeman and Medoff 1984, Lawler and West 1985, Bronfenbrenner 1994). A major tactic used in recent years by unions to counter employer opposition to union organizing is the negotiation of agreements with management to remain neutral in certification elections, to conduct expedited elections, or to recognize the union based solely on the presentation of sufficient number of signed membership cards. As hope for reform of the National Labor Relations Act has faded, union attention has shifted to the neutrality agreement approach. Further, many unions have come to view such agreements as essential elements or quid pro quo's of broader union-management partnerships. In this context, the neutrality pledge strengthens the union's ability to organize and demonstrates

management recognition of the legitimacy of union institutional goals and organizational viability parallel to that which unions show for employers' to restructure to business practices.

While there appears to be a growing focus within the labor movement on neutrality and card check (N/CC) agreements, little is actually known about them. This study summarizes the results of a study of approximately 114 such agreements. The information obtained about these agreements includes their bargaining history, coverage, substantive content and issues related to organizing experience such as the number of organizing campaigns conducted, the tactics used by both union and management, and success rates. Significant findings in each of these areas, outlined in more detail throughout this study, suggest that the heightened interest in this strategy is not misplaced. Several major unions have used a wide range of tactics to secure N/CC language which, in turn, has produced both organizing victories and successful negotiation of first contracts. However, there are clearly provisions, especially regarding card check recognition and prohibition of specific management tactics, make some agreements more successful for unions.

In the following sections of this paper, we briefly describe our research methods and then present our results. We first examine the negotiation of the agreements, including coverage of the agreement and the date and process of the negotiations. We then look at the specific types of language that were bargained. We next turn to the organizing experience under the agreements,

including success rates, management violations and impact on union tactics. Finally, we use our data to offer explanations for the successes generated by the agreements.

Research Methods

The first stage of this multi-year project involved surveying union staff or officers of international unions with 100,000 or more members primarily in the private sector to identify current or recent N/CC agreements negotiated with employers. Completed early in 1997, this effort identified over 50 such agreements negotiated by at least 13 separate unions (Eaton and Kriesky 1997). It should be noted that we were fairly specific in the types of agreements we sought to identify. One question asked for any 'neutrality or non-interference agreements (an agreement in which the employer agrees to remain neutral regarding union organizing conduct)." A second question asked for other agreements "regarding organizing unorganized workers such as card check arrangements, unit accretion, physical access, etc.", Although we did ask about accretion agreements, very few respondents listed any and so we chose not to pursue that type of agreement in any detail. As the study progressed, we also ruled out agreements that were not in writing. Finally, the sample includes agreements that are currently in effect as well as some that have recently (within a few years of the research beginning) expired.

The intent of the second phase was to examine the negotiation, content and utility of these

agreements in some detail. In the course of collecting data for this phase of the project, we identified a significant additional number of agreements, totaling to 131. These 131 agreements are distributed unevenly across 21 unions (19 if we include two recent Steelworkers affiliates within that Union). Four unions reported over 10 agreements (two of those had over 20). Ten unions had only one or two. Figure 1 shows the sectoral distribution of these 131 agreements (see also Table 1). Figure 2 shows the sub-sectoral distribution within the service sector (see also Table I a).

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF California
SOUTHERN DIVISION
Case No. 02-C V-377-GLT (ANX)

THE CHAMBER OF COMMERCE OF THE UNITED STATES, *et al.*,

Plaintiffs,

v.

BILL LOCKYER, *et al.*,

Defendants,

and

AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS and CALIFORNIA LABOR FEDERATION, AFL-CIO,

Intervenors.

INTERVENORS' REPLY MEMORANDUM IN SUPPORT OF INTERVENORS' MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, PARTIAL SUMMARY JUDGMENT

* * * * *

E. AB 1889 Is Not Preempted by the Medicare Act, the Medicaid Act or the State Medicaid Plan.

1. In their motion for summary judgment, plaintiffs argued that the Medicare and Medicaid Acts preempted AB 1889 because Congress occupied the field of provider cost reporting and reimbursement. As we previously explained, this argument conflates the distinction between the Medicare and Medicaid Acts. The Medicare Act, which creates a federally funded health insurance program in which no state funds are involved, has no bearing on AB 1889, which regulates the use only of state funds. And Congress, through the Medicaid Act, in no way intended to displace state regulation of Medicaid provider reimbursement. The structure and legislative history of the Medicaid Act demonstrate that Congress intended the states to have broad latitude to design and administer their Medicaid programs in general and their Medicaid reimbursement systems in particular. *See* Intervenors' Cross-Mot. S.J. at 14:5-15:13; Intervenors' Opp. Pls. Mot. S.J. at 19:25-23:4.

In their opposition to our cross-motion for summary judgment, plaintiffs now contend that AB 1889 is also preempted because it conflicts with California's state Medicaid plan. Plaintiffs argue that while AB 1889 bars expenditures for certain activities, the state plan — prior to a recent amendment — allowed these same expenditures to be included in a Medi-Cal provider's cost report, and that this "conflict" results in the preemption of AB

1889. *See* Pls. Opp. Cross-Mot. S.J. at 27:23-30:6. Plaintiffs' argument papers over the critical distinction between the activities controlled by California's state Medicaid plan and those governed by AB 1889, While the former sets forth how Medicaid providers report costs for the state's prospective rate-setting purposes, the latter regulates how Medicaid providers spend state Medicaid funds. Given this distinction, plaintiffs' alleged "conflict" is illusory.

As set forth in our cross-motion for summary judgment, California requires Medi-Cal providers to submit cost reports; the state then sets prospective Medi-Cal reimbursement rates on the basis of cost reports submitted by providers statewide. *See* Intervenors' Cross-Mot. S.J. at 16:7-16. Accordingly, the state does not directly reimburse a Medi-Cal provider for the expenditures it individually incurs and reports.

California has amended the state plan to prohibit Medi-Cal providers from reporting expenditures that assist, promote, or deter union organizing where such expenditures were paid with state funds. *See* Morrow Dee Supp. Defs. Cross-Mot. S.J. ¶ 3, Ex. A at 3 (discussing Amendment #02-006). Plaintiffs object to Amendment #02-006 on procedural grounds. But regardless of the Amendment's validity, the reporting requirements of the state plan merely specify — as their name would suggest — which expenditures a Medi-Cal provider may include in the cost report it submits to the state. With respect to the question whether a Medi-Cal provider may spend state funds to assist, promote, or deter union organizing, the state plan itself (both

before and after the adoption of Amendment #02-006) says nothing at all.

Instead, the provision of state law that regulates whether a Medi-Cal provider may spend state funds to assist, promote, or deter union organizing is AB 1889. And that statute — unlike the state plan — does not regulate Medi-Cal cost reporting.[2] Rather, it requires that providers who opt to participate in state programs such as Medi-Cal not *spend* state funds to assist, promote, or deter union organizing. Accordingly, plaintiffs have identified no "conflict" at all between the statute, which regulates expenditures, and the state plan, which regulates reporting.

Moreover, conflict preemption occurs where "where compliance with both federal and state regulations is a *physical impossibility*." *Boggs v. Boggs*, 520 U.S. 833, 844, 117 S.Ct. 1754, 1762 (1997) (emphasis supplied) (internal quotation marks and citation omitted). Even assuming that the state plan (without Amendment #02-006) allowed reporting of costs to assist, promote or deter union organizing, and that a reporting regulation could conflict with an expenditure regulation, the state plan certainly did not require such costs to be reported.

2. In any event, a "conflict" between the state plan and AB 1889 would not result in the statute's preemption. Plaintiffs do not explain how a

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[2] Cal. Gov. Code § 16645.7, the section of AB 1889 pertinent to Medi-Cal, requires only that private employers receiving state funds in excess of $10,000 "*maintain records* sufficient to show that state funds have not been used for. . . expenditures [to assist, promote, or deter union organizing]." (Emphasis supplied).

conflict between the *state* Medicaid plan and a *state* statute could give rise to *federal* preemption. And clearly, any effort to rely upon the *state* Medicaid plan to invalidate AB 1889 is barred by the Eleventh Amendment. *See Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 106, 104 S.Ct. 900, 911(1984) (Eleventh Amendment bars "[a] federal court's grant of relief against state officials on the basis of state law").

3. In an effort to create a live "conflict" between AB 1889 and the state plan, plaintiffs devote the bulk of their Medicaid argument to attacking the procedural validity of Amendment #02-006 on the ground that no public notice was given. *See* Pls. Opp. Cross-Mot. S.J. at 29:5-30:6. For the reasons set forth above, the "conflict" of which plaintiffs complain would not result in the invalidation of AB 1889, even if Amendment #02-006 had never been adopted or were procedurally invalid. But equally to the point, the procedural validity of Amendment #02-006 is not before the Court in this lawsuit, which is directed at the validity of AB 1889. Plaintiffs seek a declaration that AB 1889 is unenforceable and an injunction against the statute's enforcement, but have sought no relief with respect to Amendment #02-006. *See* Complaint at 27.

Furthermore, plaintiffs have not established that they have a right to enforce, through a private lawsuit, the procedural requirements of 42 U.S.C. § 13 96a(a)(13)(A), the Medicaid Act's reimbursement provision. Congress enacted the current version of § 1396(a)(13)(A) and repealed its predecessor — the Boren Amendment — in part to overrule legislatively the Supreme Court's decision in *Wilder v. Virginia*

Hosp. Assn., 496 U.S. 498, 110 S.Ct. 2510 (1990), which had held that the Boren Amendment created a right of Medicaid providers, enforceable through 42 U.S.C. § 1983, to reasonable and adequate reimbursement rates. *See Evergreen Presbyterian Ministries Inc. v. Hood*, 235 F.3d 908, 919 n.12 (5th Cir. 2000) ("Congress intended [in repealing the Boren Amendment]... to eliminate a basis for causes of action by providers to challenge reimbursement rates"). The House Report on H.R. 2016, which enacted the current version of § 13 96a(a)(1 3)(A), explains:

> Section 3411 repeals the Boren Amendment and establishes a public notice process for setting payment rates.... It is the Committee's intention that, following enactment of this Act, neither this nor any other provision of [42 U.S.C. § 1396a} will be interpreted as establishing a cause of action for hospitals and nursing facilities relative to the adequacy of the rates they receive.

H.R. Rep. No. 105-149, at 591 (1997).

In light of Congress' expressed intent to *eliminate* a cause of action for providers to challenge the reimbursement provisions of a state's Medicaid plan, there is simply no basis for concluding that Congress intended Medicaid providers to have the right to enforce the current version of §1396a(a)(13)(A) through a private lawsuit. *See Doe v. Gonzaga*, __ U.S. ____, 122 S.Ct. 2268, 2277 (2002) (where there is "no indication that Congress intends to create new individual rights, there is no basis for a private suit, whether under [42 U.S.C.] §1983 or under an implied right of action"); *Florida Assn. of*

Rehabilitation Facilities, Inc. v. Fla. Dept. of Health and Rehabilitative Servs,, 225 F.3d 1208, 1217 n.6 (11th Cir. 2000) ("A review of the legislative history makes clear that Congress [in repealing the Boren Amendment] was indeed concerned with the cost of health care provider suits against states and sought to curb the proliferation of such suits.").

Any violations of § 1396a(a)(13)(A) must instead be addressed by the Secretary of Health and Human Services. See Doe, 122 S.Ct. at 2279 (nondisclosure provisions of Federal Educational Rights and Privacy Act not privately enforceable and instead "serve primarily to direct the Secretary of Education's distribution of public funds to educational institutions").[3]

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[3] Even under the Boren Amendment, the Ninth Circuit held: "Our duty is not to determine for ourselves whether the State's notice sufficiently complied with the statute and regulations; that duty is imposed upon the Secretary." *Independent Acceptance Co. v. California*, 204 F.3d 1247, 1251-52 (9th Cir. 2000) (concluding that Secretary did not act arbitrarily or capriciously in accepting State's assurance that requisite notice was given). Plaintiffs have not established that the federal government acted arbitrarily or capriciously in approving Amendment #02-006. The record establishes that "[t]he State has in place a public process which complies with the requirements of [42 U.S.C. § 1396J(a)(13)(A) of the Social Security Act." Hardiman Decl. Supp. Defs. Cross-Mot. S.J., Ex. B at 67 & Ex. C at 95. The record also indicates that Amendment #02-006 was not the type of amendment that required public notice. Section 1396a(a)(13)(A)(i) requires public notice of "proposed rates, methodologies underlying the establishment of such rates, and justifications for the proposed rates." As the State's request to the federal government for approval of Amendment #02-006 explains, however, the proposed "changes *do not affect the rate setting methodology*, but clarify what may be included as allowable costs." Morrow

4. Plaintiffs assert that there was a "19 month period," prior to the adoption of the Amendment, during which AB 1889 and the state plan were in "direct conflict." Pls. Opp. Cross-Mot. S.J. at 30 n. 22. But even if there were such a "conflict" (and there was not), it is now moot, for it arose prior to and was eliminated by the state's adoption of Amendment #02-006, the validity of which plaintiffs are not free to attack in this proceeding. Plaintiffs seek only declaratory and injunctive relief. Complaint at 27. The "19 month period" — now past — during which they assert a "conflict" raises no live controversy.

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(continued...)

Decl. Supp. Defs. Cross-Mot. S.J., Ex. A at 3 (emphasis supplied). By the terms of § 1 396a(a)(1 3)(A)(i), an amendment that does not alter the state's reimbursement methodology would not require public notice. Accordingly, the Secretary's approval of Amendment #02-006 was not arbitrary or capricious. *See Independent Acceptance Co.*, 204 F.3d at 1252 ("Secretary ha[s] discretion to determine whether the State had given sufficient assurance that its notice was in substantial compliance.").

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

Case No. SACVO2377GLT(ANx)

The Chamber of Commerce of the United States, *et al.*
Plaintiffs,

v.

Bill Lockyer in his capacity as Attorney General of the State of California, The Department of Health Services, Frank G. Vanacore as the Chief of the Audit Review and Analysis Section of the California Department of Health Services, and Diana M. Bonta R.N., Dr., P.H. as the Director of the California Department of Health Services and DOES 1 through 10,
Defendants,

and

American Federation of Labor and Congress of Industrial Organizations and California Labor Federal, AFL-CIO,

Intervenors.

DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN REPLY TO PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, PARTIAL SUMMARY JUDGMENT

* * * * *

VI. PLAINTIFFS HAVE FAILED TO REFUTE STATE DEFENDANTS' SHOWING THAT AB 1889 IS NOT PREEMPTED BY EITHER THE MEDICARE ACT OR THE MEDICAID ACT.

Plaintiffs' opposition papers utterly fail to refute our showing that AB 1889 is not preempted by either the Medicare Act or the Medicaid Act. Rather, plaintiffs' argument is based on a confusion of the issues and a misunderstanding of the law applicable to Medicaid programs.

Plaintiffs begin their groundless argument by stating that AB 1889 prohibits Medi-Cal providers from making expenditures for certain activities, while allowing those activities to be used to determine the amount that providers receive in payment for services provided to Medi-Cal beneficiaries. Plaintiffs' memo., p. 1-4. This argument fails to distinguish between two separate sources of regulation over Medi-Cal providers. While AB 1889 regulates the manner in which Medi-Cal providers may spend state funds, it does not govern which expenditures are used to determine the prospective reimbursement rates ultimately set by the state for different classes of Medi-Cal providers statewide.

The latter is instead governed by the cost reporting requirements of the State Medical Plan, as amended by Amendment 02-006. To be sure, AB 1889 and Amendment 02-006 both contain various requirements with respect to expenditures, paid out of state funds, to assist, promote, or deter union organizing. But AB 1889 mandates only that such expenditures not be *made*, while Amendment 02-006 requires only that such expenditures are not allowable in determining Medi-Cal reimbursement rates for such services.

Plaintiffs' attempt to make much of certain distinctions between the provisions of AB 1889 and portions of the Medicare Provider Reimbursement Manual (PRM). Plaintiffs' argument has no significance or effect with regard to their preemption claim. As demonstrated in State Defendants' moving papers, Medicare is a federal program that does not regulate or govern Medicaid providers in general or the Medical program in particular.

Moreover, both AB 1889 and the PRM carry out the same **general** purpose of excluding reimbursement for employers' expenditures for anti- or pro-unionization activities. AB 1889 and the PRM need not be identical in the manner in which they effect that purpose, and any differences in the details of how they respectively achieve that goal certainly do nothing to support plaintiffs' argument that AB 1889 is preempted. To the extent that AB 1889 does not perfectly mirror every provision of the PRM, such differences are perfectly unassailable, given the well-established leeway accorded the states to tailor their Medicaid reimbursement methods to their own needs and circumstances. *See Evergreen Presbyterian*

Ministries Inc. v. Hood, 235 F.3d 908, 919 n. 12 (5th Cir. 2000) (Congress enacted current version of Medicaid Act's reimbursement provision and repealed predecessor, known as Boren Amendment, "to free the states from federal regulation"); *Indiana Ass 'n of Homes for the Aging Inc. v. Indiana Ofc. of Medicaid Policy and Planning*, 60 F.3d 262, 266 (7th. Cir. 1995) (Boren Amendment gave states "broad discretion . . . to establish payment and reimbursement systems"). Clearly, the federal approval of State Plan Amendment 02-006 (assuming, as plaintiffs do, that the amendment contains the substantive content of AB 1889) evinces the federal government's assertion that AB 1889 comports with, and is not preempted by, federal law. *See New York State Dept. of Soc. Servs. v. Dublino*, 413 U.S. at 418, 420-21 (New York's requirements that welfare recipients work, in order to receive benefits from "cooperative federalism" public assistance program, not preempted where, inter alia, responsible federal agency approved New York's incorporation of work requirements into its public assistance plan); *Indiana Assn.*, 60 F.3d at 270 (according HCFA's approval of Indiana's state plan "considerable weight").

Plaintiffs contend that the submission of the amendment "is itself an explicit concession that a conflict existed" between federal law and AB 1889. That contention has no basis in either law or fact. While plaintiffs argue that "If there was no conflict, there would be no need to the State to submit a SPA," (Plaintiffs' memo., 28:26-27), it is exactly the converse that is true: If there were a conflict between AB 1889 and the PRM, the Medicare Act or the Medicaid Act, the federal government would not have approved the amendment.

Plaintiffs' argument further reveals their misapprehension of Medicaid law. They assume that the State Plan Amendment was submitted in order to correct conflicts between the Medicaid state plan and federal law (Plaintiffs' memo., 28:26-27), and that even assuming the state plan is now consistent with federal law, the two must have been inconsistent prior to the approval of the amendment. In fact, as set forth in our moving papers, the states are permitted considerable discretion and leeway to design their state plans, including their reimbursement schemes, in order to accommodate their own needs. Plan amendments are commonly utilized to modify state plans in order to better meet changing needs and to make improvements to the system, and the approval of an amendment hardly means that what existed in the plan prior to the amendment was invalid.

Furthermore, even though the amendment has been approved by the federal government agency responsible for administering the Medicaid and Medicare programs, plaintiffs inexplicably argue that it is invalid because public notice of the amendment was not given. That argument yet again reveals plaintiffs' misunderstanding of Medicaid requirements. The state must give public notice of any significant proposed changes to the methods and standards for setting reimbursement payment rates. 42 C.F.R. section 447.205(a). AB 1889 clearly does not establish, alter, or in any way prescribe Medi-Cal reimbursement rates.[4]

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[4] It is worth noting that, in addition to lacking legal merit, plaintiffs' notice argument also lacks a factual basis. Plaintiffs begin by inverting the burden of proof, asserting that the State

The final offering from plaintiffs, in response to State Defendants' showing that there is no Medicare or Medicaid preemption, is particularly weak. In footnote 22 of their memorandum, plaintiffs argue that AB 1889 was ineffective for 19 months prior to its effective date, because during that time the statute was in conflict with the Stats Plan and the "Medicaid Program," and the amendment had not as yet cured that conflict. Plaintiffs' memo., p. 30, fn. 22. To begin with, plaintiffs have not shown, and cannot show, any preemption of AB 1889 by the Medicare or Medicaid Acts.

But even assuming that there were some merit in plaintiffs' claim of a conflict, it is now moot. Plaintiffs' suit seeks declaratory relief and

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(continued...)

Defendants must present evidence that public notice was given. Plaintiffs' memo., 29:14. Of course, the State Defendants have no such burden. Plaintiffs then present and rely upon the declaration of Mark Reagan, which purportedly supplies the factual foundation for their public notice argument. In fact, the Reagan declaration does not at all support the characterization given it in plaintiffs' opposition memorandum. In their memorandum, plaintiffs claim that Mr. Reagan "requested information from DHS whether it intended to submit a SPA with regard to AB 1889." Plaintiffs' memo., 29:17-19. In fact, in his letter Mr. Reagan offered a legal argument that there were "inconsistencies between the requirements of AB 1889 and HIM-15,"stated that he "presume(d) that the Department would possibly decide to amend the State Plan to resolve (such) inconsistencies," and stated that he would "appreciate learning the Department's ultimate determination on this issue." Decl. of Reagan, Ex. A, p.3. Mr. Reagan's legal argument and presumption based on it were both wrong, and the Department need not have agreed with them or made any determination based on it.

prospective injunctive relief.

It does not, and, under the Eleventh Amendment cannot, seek retrospective damages or other retrospective relief.

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

CASE No. SA CV02377 GLT (ANx)

The Chamber of Commerce of the United States, California Chamber of Commerce Employers Group, California Healthcare Association, California Manufacturers and Technology Association, California Association of Health Facilities, California Association of Homes & Services for the Aging, Bettec Corporation, Marksherm Corporation, Zilaco, Inc., Zilaco Del Rio Healthcare Inc., Beverly Health & Rehabilitation Services, Inc. dba Beverly Manor — Costa Mesa, Internext Group,

Plaintiffs,

v.

Bill Lockyer in his capacity as Attorney General of the State of California, The Department of Health Services, Frank G. Vanacore as the Chief of the Audit Review and Analysis Section of the California Department of Health Services, and Diana M. Bontá, R.N., Dr., P.H. as the Director of the California Department of Health Services and DOES 1 through 10,

Defendants.

[PROPOSED] STATEMENT OF UNCONTROVERTED FACTS AND CONCLUSIONS OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, PARTIAL SUMMARY JUDGMENT

I. UNCONTROVERTED FACTS

After consideration of the papers, evidence and argument properly submitted by the parties in support of and in opposition to Plaintiffs' Motion for Summary Judgment, the Court hereby finds the following facts are uncontroverted. To the extent any such uncontroverted facts are deemed to be conclusions of law, they should be understood as incorporated in Section II below as though fully set forth therein.

1. On September 28, 2000 Governor Davis signed AB 1889 into law, making it effective January 1, 2001. (North Decl. Exh. 1.)

2. On March 1, 2002, the Department of Health Services ("DHS") Audit Division began sending out a letter dated February 28, 2002 requiring that skilled nursing facilities and intermediate care facilities return the enclosed certification, certifying that they will comply with California Government Code Section 16645.7 of AB 1889, or forfeit their right to participate in, and receive funds from, the Medi-Cal program. (Armentrout Decl., Exh. 1.)

3. Recipients of the February 28, 2002 letter were given forty-five days from the letter's

date, or until April 15, 2002 to respond. (Armentrout Decl., Exh. 1.)

4. Plaintiffs Zilaco, Inc., Zilaco, Del Rio Healthcare Inc., Beverly Health & Rehabilitation Services, Inc. dba Beverly Manor — Costa Mesa, and Internext Group and members of Association Plaintiffs received the February 28, 2002 letter from the DHS. (Highland Decl. ¶5; Swales Decl. ¶5; Zilafro Decl. ¶ 5; Wheeler Decl. ¶ 5; Armentrout Decl. ¶ 10; Johnson Decl. ¶ 9.)

5. Members of Plaintiffs CAHF and CAHSA did not sign and return the certification as required in the March 1 and March 15, 2002 letters. (Armentrout Decl. ¶12; Johnson Decl. ¶ 11.)

6. On April 26, 2002, the DHS sent out a second letter to recipients of the February 28, 2002 letter who did not sign the certification. This letter required recipients to sign and return the certification, certifying that they will comply with California Government Code Section 16645.7. The recipients were required to return the certification to the DHS within 15 days of the date of the letter. (Armentrout Decl., Exh. 3.)

7. On March 15, 2002, the DHS subsequently sent letters to intermediate care for the developmentally disabled facilities participating in the Medi-Cal program requiring that they return the enclosed certification, certifying they will comply with California Government Code Section 16645.7, or forfeit their right to participate in, and receive funds from, the Medi-Cal program. (Armentrout Decl., Exh. 2.)

8. The recipients of the March 15, 2002 letter were given forty-five days from the letter's date to respond. (Armentrout Decl., Exh. 2.)

9. In a letter dated April 10, 2002, to David Johnson of the California Nurses Association, Attorney General Bill Lockyer stated, "I have made the enforcement of AB 1889 a priority .... As Attorney General, I am strongly committed to seeing that this public policy is implemented." (North Decl., Exh. 2.)

10. On May 18, 2001, Bill Lockyer sent an accounting demand to AB Crispino and Company, Inc., demanding that it provide records to show that it was in compliance with AB 1889. (Armentrout Decl., Exh. 4.)

11. On May 23, 2001, the Service Employees International Union filed a lawsuit against AB Crispino Company, Inc. under AB 1889. (Armentrout Decl., Exh. 5.)

12. On May 18, 2001, Bill Lockyer sent an accounting demand to Fountain View, Inc., demanding that Fountain View, Inc. provide records to show that it was in compliance with AB 1889. (Armentrout Decl., Exh. 6.)

13. On November 19, 2001 Bill Lockyer filed a lawsuit against Fountain View, Inc. under AB 1889. (Armentrout, Decl., Exh. 7.)

14. On May 1, 2002, Bill Lockyer sent an accounting demand to Palomar Pomerado Health, demanding that Palomar Pomerado Health provide records to show that it was in compliance with AB 1889. (Sponseller Decl., Exh. 1.)

15. AB Crispino and Company, Inc., Fountainview, Inc., and Palomar Pomerado Health

each receive over $10,000 per calendar year as a result of participation in the state's Medi-Cal program. (Armentrout Decl., Exhs. 4 and 6; Sponseller Decl., Exh. 1.)

II. CONCLUSIONS OF LAW

Based on the foregoing, the Court now makes the following legal conclusions. To the extent these conclusions of law are deemed to be statements of uncontroverted facts, they should be understood as incorporated in Section I above as though set forth fully therein.

1. This Court has subject matter jurisdiction to adjudicate this controversy pursuant to 28 U.S.C. §§ 1331 and 1367(a).

2. Venue is proper in this Court pursuant to 28 U.S.C. Section 1391(b).

3. Plaintiffs the Chamber of Commerce of the United States, California Chamber of Commerce, Employers Group, California Healthcare Association, California Manufacturers and Technology Association, California Association of Health Facilities, and California Association of Homes & Services for the Aging (collectively "Association Plaintiffs") have organizational standing pursuant to *Friends of the Earth v. Laidlaw Environmental Services,* 120 S. Ct. 693, 704 (2000), because each association has at least one member employer which has standing in its own right to present the claims asserted herein. Members of Association Plaintiffs have faced, are currently facing and/or will likely face union organizing and/or decertification activities. Further, the interests sought to be protected, are germane to the associations' purposes, and neither

the claims asserted nor the relief requested requires that the members participate individually in the suit.

4. Under AB 1889, State contractors and recipients of State funds are prohibited from incurring costs "to assist, promote or deter union organizing", unless they establish accounting procedures to document the segregation of funds so that no State funds contribute to the prohibited activity. Cal. Gov't Code §§ 6645.1(a)-(b), 16645.2(a)-(b).

5. State contractors and recipients of State funds are required to provide proof of such accounting upon request by the Attorney General, Cal. Gov't Code §§ 16645.1(b), 16645.2(c).

6. Violators are assessed treble damages – the amount allegedly improperly expended, plus a civil penalty of double that amount. See Cal. Gov't Code §§ 16645.1(c), 16645.2(d).

7. State contractors may not assist, promote, or deter union organizing by employees who are performing work on a service contract for the State or State agency, regardless of whether the employer does so with private sources. *See* Cal. Gov't Code § 16645.3(a). Penalties are assessed at $1,000 per employee per violation. § 16645.3(b).

8. An employer who conducts business on state property under a contract or lease may not used that property to hold a meeting with any employees or super visors if the purpose is to "assist, promote, or deter union organizing. Cal. Gov't Code § 16645.5(a). Violators are assessed a civil penalty of $1,000 per employee per meeting. *See* Cal. Gov't Code § 16645.5(b).

9. AB 1889 prohibits "legal and consulting fees and salaries of supervisors and employees, incurred for research for, or preparation, planning, or coordination of, or carrying out, an activity to assist, promote, or deter union organizing." *See* Cal. Gov't Code § 16646(a).

10. AB 1889 prohibits private employers receiving state funds in excess of ten-thousand dollars ($10,000) in one year from using such funds to assist, promote or deter union organizing. *See* Cal. Gov't Code § 16645.7(a). Prior to participating in the state program, the employer must certify it will comply with the prohibition. *See* Cal. Gov't Code 16645.7(b). Violators must return the expended funds and will be fined a civil penalty up to twice the amount of the funds expended. *See* Cal. Gov't Code § 16645.7(d).

11. AB 1889 can be enforced by the State Attorney General or by taxpayers. See Cal. Gov't Code § 16645.8(a).

12. AB 1889 purports to regulate employer speech protected by Section 8(c) of the National Labor Relations Act ("NLRA"). Thus, AB 1889 is preempted under 29 U.S.C. 158(c) pursuant to *San Diego Bldg. Trades Council v. Garmon,* 359 U.S. 236, 79 S. Ct. 773, 3 L. Ed. 2d 775 (1959), because Congress intended state laws and causes of action to be preempted when they seek to regulate activity that is even arguably protected or prohibited by Sections 7 and 8 of the NLRA. AB 1889 is also preempted under 29 U.S.C. 158(c) pursuant to *International Ass'n of Machinists and Aerospace Workers v. Wisconsin Employment Relations Comm'n,* 417 U.S. 132, 96 S. Ct. 2548, 49 L. Ed. 2d 396 (1976), because Congress

intended employer speech rights protected under Section 8(c) of the NLRA to be unregulated.

13. AB 1889 attempts to regulate record-keeping and cost reporting of Medi-Cal providers. However, the Labor Management Relations and Reporting Act ("LMRDA"), 29 U.S.C. §§ 401-531, comprehensively regulates the reports that employers, labor relations consultants, labor organizations, and officers and employees of labor organizations must make to the public regarding labor relations issues. Therefore, AB 1889 is preempted under the LMRDA.

14. The Medicare and Medicaid Act, 42 U.S.C. § 1395 *et. seq.*, also preempt AB 1889. AB 1889 attempts to regulate Medi-Cal provider cost reporting, reimbursement, and record-keeping, as well as extend judicial review of such procedures. However, the Medicare Act "so comprehensively occupies the field of Medicare provider cost reporting and reimbursement that there remains no room for state action." *Congress of California Seniors v. Catholic Healthcare West,* 87 Cal. App. 4th 491, 509, 104 Cal. Rptr. 2d 655, 668 (2001). Moreover, "Medi-Cal cost reporting and reimbursement is inextricably tied to Medicare cost reporting, and [AB 1889 is] preempted for the same reasons." 87 Cal. App 4th 491, 510, 104 Cal. Rptr. 2d at 669.

15. AB 1889 goes well beyond merely expressing a legislative choice not to fund employers' speech concerning union organization or a particular project because it flatly prohibits employees, including supervisors, from discussing unions while on the clock even during paid rest breaks or working lunches. Thus, AB 1889 violates the First

Amendment of the United States Constitution and Article I, Section 2(a) of the California Constitution because "[t]he First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic." *Consol. Edison Co. v. Pub. Serv. Comm'n of N. Y.*, 447 U.S. 530, 537, 100 S. Ct. 2326, 2333, 65 L.Ed.2d 319 (1980). AB 1889 is unconstitutional because it violates the First Amendment of the United States Constitution and Article I, Section 2(a) of the California Constitution.

16. AB 1889 allows state property and state funds to be used for expression and other activities favoring unionization (by unions and by employers willing to extend recognition to unions without elections), while burdening expression by employers questioning the merits of unionization. Therefore, AB 1889 constitutes invidious viewpoint discrimination which the government may not engage in because "the principle of viewpoint neutrality ... underlies the First Amendment." *Bose Corp. v. Consumers Union of United States,* 466 U.S. 485, 505, 104 S. Ct. 1949, 1962, 80 L. Ed. 2d 502 (1989).

17. AB 1889 constitutes a prior restraint on employer and employee speech and thus violates the First Amendment. *See Nebraska Press Ass'n v. Stuart,* 427 U.S. 539, 96 S. Ct. 2791, 49 L. Ed. 2d 683 (1976).

18. AB 1889 also violates the First Amendment because it is void for vagueness and "raises special First Amendment concerns because of its obvious chilling effect on free speech." *Reno v.*

ACLU, 521 U.S. 84.4, 871-872, 117 S. Ct. 2329, 2345, 138 L. FA. 2d 874 (1997). AB 1889 is unconstitutionally vague because it is unlikely that most employers will understand precisely what is prohibited by it.

19. Whenever a law impacts equivalent entities differently, in such a way as to "burden[] a fundamental right," strict scrutiny analysis is appropriate. *Romer v. Evans,* 517 U.S. 620, 631, 116 S. Ct. 1620, 1627, 134 L. Ed.2d 855 (1996). AB 1889 plainly violates a fundamental right, namely an employers' First Amendment protected interest in being able to express its views to employees regarding unionization. As such, AB 1889 should be subject to strict scrutiny and found to be invalid under the Equal Protection clause because it reflects an invidious method of silencing one side of the debate in order to allow the other side to proceed unchecked.

20. AB 1889 denies state contractors, fund recipients, program participants and lessees the right to consult with and be represented by legal counsel and thus violates the Due Process Clause guarantees of the Fourteenth Amendment of the United States Constitution because the right to choose, consult with and be represented by one's counsel are fundamental rights guaranteed under the Due Process Clause. *See Prudential Ins. Co, v. Small Claims Court,* 76 Cal, App. 2d 379, 382, 173 P.2d 38 (1946).

* * * * *

Dated: May 24, 2002

By /s/
Stephen P. Pepe
Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA,
SOUTHERN DIVISION

Case No. SACVO2377GLT(ANx)

The Chamber of Commerce of the United States, *et al.*

Plaintiffs,

v.

Bill Lockyer in his capacity as Attorney General of the State of California, The Department of Health Services, Frank G. Vanacore as the Chief of the Audit Review and Analysis Section of the California Department of Health Services, and Diana M. Bonta R.N., Dr., P.H. as the Director of the California Department of Health Services and DOES 1 through 10,

Defendants,

and

American Federation of Labor and Congress of Industrial Organizations and California Labor Federal, AFL-CIO,

Intervenors.

JUDGMENT PURSUANT TO F.R.C.P. 54(b)

On September 16, 2002, the Court entered an Order Granting Plaintiffs' Motion for Summary Judgment in Part, which finds that California Government Code sections 16645.2 and 16645.7 are preempted by the National Labor Relations Act. The parties have requested that a partial final judgment be entered pursuant to FRCP 54(b), and the Court finds that there is no just reason for delay. Accordingly, judgment is hereby entered as follows:

1. California Government Code sections 16645.2 and 16645.7 are hereby declared to be invalid as applied to employers covered by the National Labor Relations Act. The Court finds sections 16645.2 and 16645.7 to be preempted by the National Labor Relations Act and thus invalid under the Supremacy Clause.

2. Defendants and Intervenors, as well as their agents, servants, and employees and those persons in active concert or participation with them who receive actual notice of this Order, are hereby enjoined and restrained from taking any actions to enforce California Government Code sections 16645.2 and 16645.7 on behalf of the people of the State of California against any employer covered by the National Labor Relations Act.

Dated: Jan. 3, 2003

/s/
GARY L. TAYLOR
Judge of the United States District Court, Central District of California

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA,
SOUTHERN DIVISION

Case No. SACVO2377GLT(ANx)

The Chamber of Commerce of the United States, *et al.*

Plaintiffs,

v.

Bill Lockyer in his capacity as Attorney General of the State of California, The Department of Health Services, Frank G. Vanacore as the Chief of the Audit Review and Analysis Section of the California Department of Health Services, and Diana M. Bonta R.N., Dr., P.H. as the Director of the California Department of Health Services and DOES 1 through 10,

Defendants,

and

American Federation of Labor and Congress of Industrial Organizations and California Labor Federal, AFL-CIO,

Intervenors.

* * * * *

pursuant to California Government Code section 16645.8. The parties further stipulate that this action shall be deemed "first in time" to any subsequently threatened enforcement action against any Plaintiff or any member of a Plaintiff association, thus precluding abstention under Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971).

5. The parties understand and agree this Stipulation is intended to streamline the challenge to California Assembly Bill 1889 and to facilitate a substantive ruling by the appellate court on whether California Government Code sections 16645.2 and 16645.7 are preempted by the National Labor Relations Act, thereby providing guidance for challenges to the remainder of the statute. Accordingly, the parties agree they will not raise any other issues on appeal, including but not limited to, standing, venue, abstention under Younger v. Harris, 401 U.S. 37, 91 S.Ct 746 (1971) or Railroad Commission of Texas v. Pullman Co., 312 U.S. 496, 61 S.Ct. 643 (1941), LMRDA, MediCal or MediCaid preemption or violation of the First Amendment provided however nothing herein shall preclude the parties from arguing First Amendment principles

and case law solely as they relate to the impact or effect on the National Labor Relations Act preemption doctrine.

6. The parties recognize the stipulations contained herein are contingent on: (1) this Court granting Defendants' and Intervenors' Motions for Reconsideration, as specified in Paragraph 1 above; (2) this Court's entry of Judgment under Federal Rule of Civil Procedure 54(b), granting in part Plaintiffs' Motion for Summary Judgment as specified in Paragraphs 2 and 3 above; and (3) this Court granting a stay of the remaining portions of the instant action under the terms set forth in Paragraph 4 above.

* * * * *

Nos. 03-55166 and 03-55169

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CHAMBER OF COMMERCE OF UNITED STATES, *et al.*,

Plaintiffs-Appellees,

v.

BILL LOCKYER, in his capacity as Attorney General of the State of California, *et al.*,

Defendants-Appellees,

AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS *et al.*

Intervenors-Appellants.

DECLARATION OF SUZANNE M. AMBROSE IN SUPPORT OF DEFENDANTS-APPELLANTS' REQUEST FOR JUDICIAL NOTICE

I, SUZANNE M. AMBROSE, declare:

1. I am an attorney at law admitted to practice before the bar of this Court. I am a Supervising Deputy Attorney General in the Office of the Attorney General of California, in Sacramento, California, and I am the attorney of record for Bill Lockyer, the Attorney General of California, in this

action.

2. Attached hereto as Exhibit A is a true and correct copy of a letter from Chief Assistant Attorney General Richard M. Frank to David M. Johnson, Southern California Director of California Nurses Association ("CNN"), dated July 16, 2002.

I declare under penalty of perjury under the laws of the United States and the State of California that the foregoing is true and correct.

Executed on June 19, 2003, in Sacramento, California.

SUZANNE M. AMBROSE

Supervising Deputy Attorney General

Attorneys for Defendants-Appellants

July 16, 2002

David M. Johnson
Southern California Director
California Nurses Association
425 West Broadway, Suite 111
Glendale, CA 91204

RE: Palomar Pomerado Health System

Dear Mr. Johnson:

Thank you for your letter to Attorney General Lockyer, dated June 24, 2002. The Attorney General has asked that I respond on his behalf.

You advise the Attorney General that the California Nurses Association (CNA) and the employer that was the subject of an AB 1889 notice that you lodged with this office earlier this year, Palomar Pomerado Health System (Palomar Pomerado), have resolved their differences. For that reason, you inform the Attorney General that you are withdrawing and dismissing that notice with prejudice, and you urge him to take no further action against this employer.

We are pleased to learn that CNA and Palomar Pomerado have, by working together, resolved their differences in a manner that is satisfactory to all concerned. However, I must inform you that neither withdrawal or dismissal of an AB 1889 notice, nor a request that the Attorney General take no further action against the employer that is the subject of such a notice, necessarily justifies closure of any inquiry that the Attorney General may have undertaken in response to that notice.

Each AB 1889 notice that is received by the Attorney General is evaluated to determine what action, if any, the Attorney General might take. Such review is objective and the facts and circumstances of each case are carefully evaluated. Moreover, any number of factors may be considered in determining how far an inquiry may proceed, which may include the filing of a civil action under Government Code section 16645 et seq.

Respectfully, whether we take any further action in the Palomar Pomerado matter will be determined by taking into account any and all matters and factors that we may believe are relevant. Lastly, our decision to decline automatically to conclude our review regarding Palomar Pomerado should not be construed to suggest that we have made a decision to take any particular action against that employer. I hope that you will understand the reasons why we cannot provide you with any assurance respecting what action, if any, we might take with respect to the subject notice.

Again, thank you for your letter, and we congratulate both CNA and Palomar Pomerado for working collaboratively to resolve their differences.

Sincerely,

/s/

RICHARD M. FRANK
Chief Assistant Attorney General

FOR BILL LOCKYER
ATTORNEY GENERAL

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No. 06-939

IN THE

Supreme Court of the United States

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, *ET AL.*,

Petitioners,

v.

EDMUND G. BROWN, JR., *ET AL.*,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF FOR PETITIONERS

ROBIN S. CONRAD
SHANE BRENNAN
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337
Of Counsel

WILLIS J. GOLDSMITH
(Counsel of Record)
JONES DAY
222 East 41st Street
New York, NY 10017
(212) 326-3649
Counsel for Petitioners

[Additional counsel listed on signature page]

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the State of California's regulation of noncoercive employer speech about union organizing, California Assembly Bill No. 1889, Cal. Gov't Code §§ 16645.2, 16645.7, is preempted by federal labor law.

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PARTIES TO THE PROCEEDINGS

Petitioners in this case are the Chamber of Commerce of the United States of America; California Chamber of Commerce; Employers Group; California Hospital Association (*fka* California Health-care Association); California Manufacturers and Technology Association; California Association of Health Facilities; Aging Services of California (*fka* California Association of Homes & Services for the Aging); Marksherm Corporation; Zilaco, Inc.; and Front Porch (*fka* Internext Group) ("petitioners").

Respondents in this case are Edmund G. Brown Jr., Attorney General, in his capacity as Attorney General of the State of California; California Department of Health Services; Frank G. Vanacore, as the Chief of the Audit Review and Analysis Section of the California Department of Health Services; and Diana M. Bonta, R.N., Dr., Ph.D, as the Director of the California Department of Health Services ("respondents"). Respondents California Labor Federation, AFL-CIO, and American Federation of Labor and Congress of Industrial Organizations intervened in the district court ("intervenors").

Other parties in the Ninth Circuit were Bettec Corporation; Zilaco; Beverly Health & Rehabilitation Services, Inc. (*dba* Beverly Manor Costa Mesa); and Del Rio Sanitarium, Inc. (*fka* Del Rio Health-care, Inc.).

None of the petitioners has a parent company or publicly held company owning 10 percent or more of its stock.

OPINIONS BELOW

The opinion of the United States District Court for the Central District of California was issued on September 16, 2002, and is reported at 225 F. Supp. 2d 1199 (Pet. App. 140a-149a).

The first panel opinion of the United States Court of Appeals for the Ninth Circuit was issued on April 20, 2004, and is reported at 364 F.3d 1154 (Pet. App. 114a-139a). The Ninth Circuit's order granting rehearing and withdrawing the first opinion was issued on May 13, 2005, and is reported at 408 F.3d 590 (Pet. App. 157a-158a).

The second panel opinion of the Ninth Circuit was issued on September 6, 2005, and is reported at 422 F.3d 973 (Pet. App. 58a-113a). The Ninth Circuit's order granting rehearing *en banc* was issued on January 17, 2006, and is reported at 435 F.3d 999 (Pet. App. 155a-156a); its order withdrawing the second panel opinion was issued on February 9, 2006, and is reported at 437 F.3d 890 (Pet. App. 153a-154a).

The *en banc* opinion of the Ninth Circuit was issued on September 21, 2006, and is reported at 463 F.3d 1076 (Pet. App. 1a-57a). On November 20, 2006, the Ninth Circuit entered an order staying its mandate pending this Court's disposition of this case. Pet. App. 151a-152a.

JURISDICTION

The *en banc* opinion of the Ninth Circuit was issued on September 21, 2006. Pet. App. 1a-57a. On December 7, 2006, petitioners timely filed an application to extend the time to file a petition for certiorari from December 20, 2006, to January 5,

2007. On December 12, 2006, Justice Kennedy granted the application. The petition for writ of certiorari, filed on January 5, 2007, was granted on November 20, 2007. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The principal provisions involved are the Supremacy Clause of the United States Constitution, U.S. CONST., art. VI, cl. 2; section 8(c) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158(c); and California Assembly Bill No. 1889 ("AB 1889"), Cal. Gov't Code §§ 16645-16649. Each is reproduced in the appendix to the petition for certiorari. Pet. App. 159a-167a.

STATEMENT

A. Background

In response to union lobbying efforts, California enacted AB 1889 to forbid employers receiving state funds of virtually every type, including state grant and program funds, from using those funds to "assist, promote, or deter union organizing."

1. The National Labor Relations Act

The NLRA, 29 U.S.C. §§ 151-169, was enacted in 1935 to federalize and bring uniformity to labor-management relations. *See Amalgamated Ass'n of State Elec. Ry. & Motor Coach Employees of Am. v. Lockridge*, 403 U.S. 274, 286 (1971) (the NLRA is "a comprehensive national labor law . . . for stabilizing labor relations conflict and for equitably and delicately structuring the balance of power among competing forces"). It is designed "to obtain uniform application of its substantive rules and to avoid the

diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies." *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144 (1971) (internal quotation marks omitted). Although the NLRA contains no express preemption provision, "[i]t is by now a commonplace that in passing the NLRA Congress largely displaced state regulation of industrial relations." *Wis. Dep't of Indus., Labor & Human Relations v. Gould Inc.*, 475 U.S. 282, 286 (1986).

Employees have the right under the NLRA to "join" or to "refrain" from joining a union. 29 U.S.C. § 157. To become an exclusive collective bargaining representative, a union must be supported by a majority of employees in an appropriate bargaining unit. This is typically shown through a secret-ballot election overseen by the National Labor Relations Board ("NLRB"). *Id.* § 159. The campaigns preceding these representation elections often are vigorously contested, with employees being inundated with union arguments for, and employer arguments against, unionization. *See generally Linn v. United Plant Guard Workers of Am.*, 383 U.S. 53, 58 (1966).

Labor and management "proceed from contrary and, to an extent, antagonistic, viewpoints and concepts of self-interest," *NLRB v. Ins. Agents Int'l Union*, 361 U.S. 477, 488 (1960), and employers rarely support the unionization of their employees, *e.g.*, J.A. 158. When faced with a union organizing campaign, employers often hire legal counsel to advise them about their rights and obligations under the NLRA. J.A. 132, 162-63. Before casting votes for or against union representation, employees learn of their employers' positions from supervisors,

managers, or consultants, as well as through pamphlets and other literature provided at the workplace. J.A. 132, 158, 162-63.

When Congress amended the NLRA in 1947, it added section 8(c), which provides, in pertinent part, that "[t]he expressing of any views, argument, or opinion, or the dissemination thereof, . . . shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit." 29 U.S.C. § 158(c). This Court has stated that "the enactment of § 8(c) manifests a congressional intent to encourage free debate on issues dividing labor and management." *Linn*, 383 U.S. at 62.

2. Card-Check and Neutrality Agreements

In the face of employer campaigns opposing unionization preceding NLRB secret-ballot elections, unions recently have pursued various ways to evade that process altogether. One tack has been to negotiate with employers to agree to union recognition based solely upon "authorization cards signed by a majority of the employees in an appropriate bargaining unit." Debra Charis, *Union Neutrality Law or Employer Gag Law? Exploring NLRA Preemption of New York Labor Law Section 211-A*, 14 J.L. & POL'Y 779, 785 (2006). Another, often used in conjunction with the first, has been to induce employers to agree to remain neutral throughout the union's organizing campaign, often by imposing "a 'gag order' on employer communication to employees about its views on unionization." *Id.*

As NLRB General Counsel Fred Feinstein noted in 1999, at the end of his tenure, "unions have begun to make greater efforts to obtain 'neutrality agreements'

during organizing campaigns" in order to "facilitate success in organizing." J.A. 303-04. In these neutrality agreements, Mr. Feinstein added, unions often seek to have employers "refrain from exercising their § 8(c) right to express their views about unionization." J.A. 304. A study produced that same year for the George Meany Center for Labor Studies similarly observes that "[a] major tactic used in recent years by unions to counter employer opposition to union organizing is the negotiation of agreements with management to remain neutral in certification elections . . . or to recognize the union based solely on the presentation of sufficient number of signed membership cards." J.A. 318. The authors of that report concluded that such agreements have "produced significant organizing successes." J.A. 315.

These card-check and neutrality agreements, however, depend upon the voluntary consent of employers, which often is not forthcoming. That reality has pushed unions to "lobby[] for legislation that encourages or mandates employer neutrality at the state and local levels." *See* Charish, *supra*, at 787. This case involves one example of such legislation, AB 1889, which was drafted and sponsored by intervenor California Labor Federation, AFL-CIO. J.A. 306; John Logan, *Innovations in State and Local Labor Legislation*, in 3 THE STATE OF CALIFORNIA LABOR 159 n.6 (2003) ("THE STATE OF CALIFORNIA LABOR").

3. California Assembly Bill No. 1889

a. Prohibitions and Exceptions

Signed into law by California's then-Governor Gray Davis in 2000, the preamble to AB 1889 states that "[i]t is the policy of the state not to interfere with an

employee's choice about whether to join or to be represented by a labor union" and that "[i]t is the intent of the Legislature in enacting this act to prohibit an employer from using state funds and facilities for the purpose of influencing employees to support or oppose unionization." Cal. Stats. 2000, Ch. 872, § 1.

Employers subject to AB 1889 include those receiving either a state "grant," Cal. Gov't Code § 16645.2, or over $10,000 from a "state program," *id.* § 16645.7. AB 1889 forbids such employers from using those funds "to assist, promote, or deter union organizing." *Id.* §§ 16645.2, 16645.7. This prohibition is defined to encompass "any attempt by an employer to influence the decision of its employees in this state or those of its subcontractors regarding either . . . [w]hether to support or oppose a labor organization that represents or seeks to represent those employees . . . [or] [w]hether to become a member of any labor organization," *id.* § 16645(a). This proscription applies to "any expense, including legal and consulting fees and salaries of supervisors and employees, incurred for research for, or preparation, planning, or coordination of, or carrying out, an activity to assist, promote, or deter union organizing." *Id.* § 16646(a).

AB 1889 also precludes reimbursements under state contracts to employers for any unionization activities, Cal. Gov't Code § 16645.1(a); prohibits employers from speaking to employees working on state contracts about union organizing, *id.* § 16645.3(a); imposes a spending ban with respect to union-related speech on employers with state contracts of over $50,000, *id.* § 16645.4(a); and bars

employers from using certain state property to meet with employees about union formation, *id.* § 16645.5(a).

There are significant exceptions to AB 1889's spending ban. Covered employers are free under AB 1889 to use "state funds" to enter into a "voluntary recognition agreement" with a union (*e.g.*, a card-check and neutrality agreement), thereby allowing that union to bargain collectively on behalf of the employer's workforce without having to win an NLRB secret-ballot election. Cal. Gov't Code § 16647(d). In addition, expenditures may be made to allow a union "access to the employer's facilities or property." *See id.* § 16647(b). AB 1889 also permits covered employers to use state funds in connection with expenses related to grievance handling; negotiating or administering a collective bargaining agreement; or performing an activity required by law or a collective bargaining agreement. *Id.* § 16647(a), (c).

b. Regulatory Requirements

AB 1889 requires covered employers to adhere to a number of regulatory requirements:

Certifications. All covered employers must provide a certification that they will abide by AB 1889's spending prohibitions. Cal. Gov't Code §§ 16645.2(c), 16645.7(b).

Segregated Accounting Systems. In addition, employers must create separate accounts for funds traceable to a state grant or program and implement special accounting procedures to trace all expenditures related to union organizing. That is so because if employers make an expenditure relating to union organizing from an account with commingled funds, AB 1889 presumes that "state funds" have

been (illegally) used on a *pro rata* basis. Cal. Gov't Code § 16646(b).

Employee Salaries. Employers must ensure that employees who spend any portion of their work time on proscribed unionization matters are paid for such time with funds that cannot be traced to "state funds" in order to comply with AB 1889's prohibition with respect to employee salaries. Cal. Gov't Code § 16646(a).

Recordkeeping and Disclosure. Employers must maintain records "sufficient" to show that no "state funds" were used to assist, promote, or deter union organizing, and employers must provide these records to the California Attorney General upon request. Cal. Gov't Code §§ 16645.2(c), 16645.7(c).

c. Private Lawsuits

AB 1889 subjects employers to suit by the California Attorney General or "any state taxpayer," including a union involved in an ongoing effort to organize an employer's workforce. Cal. Gov't Code § 16645.8(a). In addition to injunctive and other equitable relief, a court may award treble damages—*i.e.*, disgorgement plus a "civil penalty" of twice that amount. *Id.* §§ 16645.2(d), 16645.7(d), 16645.8(a). Although any award of damages goes to the State, a prevailing private plaintiff can recover attorney's fees and costs. *Id.* § 16645.8(d). AB 1889 does not provide for attorney's fees for a prevailing employer.

B. Statement of the Case

1. District Court Proceedings

Petitioners filed this action in 2002 in the Central District of California arguing, among other things, that AB 1889 is preempted by the NLRA and seeking

declaratory and injunctive relief. J.A. 94-127. Respondents California Department of Health Services and individual California officials were named in the complaint (J.A. 94); respondents California Labor Federation, AFL-CIO, and the American Federation of Labor and Congress of Industrial Organizations intervened (J.A. 63-64).

On cross-motions for summary judgment, the district court entered partial final judgment in favor of petitioners declaring sections 16645.2 and 16645.7 of the California Government Code preempted under the *Machinists* doctrine, which preempts state regulation of conduct that Congress intended to remain unregulated. *See Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers v. Wis. Employment Relations Comm'n,* 427 U.S. 132, 139 (1976) ("*Machinists*"). The district court determined that AB 1889 "regulates employer speech about union organizing under specified circumstances, even though Congress intended free debate." Pet. App. 147a; *see also* J.A. 349 (final judgment declaring disputed sections "to be invalid as applied to employers covered by the National Labor Relations Act").

2. Ninth Circuit Decisions

The Ninth Circuit issued three opinions in this case: two panel opinions holding that the contested provisions of AB 1889 were preempted by the NLRA, and an *en banc* opinion holding that they were not.

First panel opinion. The first Ninth Circuit opinion, authored by Judge Fisher for a unanimous court, held that AB 1889 was preempted under *Machinists*. The court, explaining that "open and robust advocacy by both employers and employees

must exist in order for the NLRA collective bargaining process to succeed," held AB 1889 preempted because it "directly regulates the union organizing process itself and imposes substantial compliance costs and litigation risk on employers who participate in that process." Pet. App. 127a.

Second panel opinion. The Ninth Circuit panel granted rehearing and withdrew its first opinion. The second opinion, written by Judge Beezer, held that AB 1889 was preempted under *Machinists* as well as the *Garmon* doctrine, which preempts state regulation of activity that is protected, prohibited, or arguably protected or prohibited by the NLRA. *See San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 241 (1959) ("*Garmon*"). The court held that "by discouraging employers from exercising their protected speech rights," AB 1889 "operates to significantly empower labor unions as against employers" and "runs roughshod over the delicate balance between labor unions and employers as mandated by Congress through the [NLRA]." Pet. App. 81a. Judge Fisher, author of the first opinion, dissented from the second opinion and would have remanded to allow the district court to consider preemption of several of AB 1889's enforcement provisions, which he stated "appear to have an impermissibly intrusive effect on the NLRA's balance . . . between employer and employee." Pet. App. 110a.

En banc *opinion.* The Ninth Circuit granted rehearing *en banc* and withdrew its second opinion. Over the dissent of three judges, the *en banc* court, in an opinion by Judge Fisher, held that AB 1889 was not preempted by the NLRA in any respect. The *en*

banc court rejected respondents' argument that AB 1889 escapes preemption because California in enacting it was not acting as a regulator, but rather as a proprietor (or "market participant"). The court held that "California's condition on the use of its funds constitutes 'regulation[],'" Pet. App. 7a, because "[t]he statute's scope indicates a general state position of neutrality with regard to organizing, not a narrow attempt to achieve a specific procurement goal," Pet. App. 12a. It nonetheless determined that AB 1889 was not preempted under either *Machinists* or *Garmon*.

The *en banc* majority held that *Machinists* was inapplicable because AB 1889 involves the use of state funds, an activity which "by definition [is] not controlled by the free play of economic forces." Pet. App. 17a. It determined, in any event, that "an employer has and retains the freedom to spend its own funds however it wishes," and that AB 1889's effect on noncoercive employer speech is therefore "indirect and incidental." Pet. App. 17a & 18a n.10. It added that *Machinists* applies only to "activity left free from all regulation," and concluded that the NLRB's "extensive regulation of organizing activities demonstrates that *organizing*—and employer speech in the context of organizing—is not such a zone." Pet. App. 19a (emphasis in original).

Garmon did not apply, the Ninth Circuit held, because noncoercive employer speech is neither actually nor arguably protected by the NLRA. It held that section 8(c) of the NLRA "does not grant employers speech rights" but "simply prohibits their noncoercive speech from being used as evidence of an unfair labor practice." Pet. App. 23a (emphasis in

original). Even were noncoercive employer speech protected under the NLRA, the *en banc* court concluded that AB 1889, as an exercise of the State's spending power, falls within an exception to *Garmon* preemption for state regulation of conduct that involves "'interests so deeply rooted in local feeling and responsibility that . . . we [cannot] infer that Congress ha[s] deprived the States of the power to act.'" Pet. App. 30a (quoting *Garmon*, 359 U.S. at 243; brackets in original).

In so holding, the Ninth Circuit expressly rejected the views of the NLRB, which, as *amicus*, argued that AB 1889 is preempted under both *Machinists* and *Garmon*. The NLRB explained that "the federal policy, expressed in NLRA Section 8(c), [is] to insure both to employers and labor organizations full freedom to express their views to employees on labor matters." NLRB Amicus Brief at 6, *Chamber of Commerce v. Lockyer* (9th Cir. Nos. 03-55166, 03-55169) (internal quotation marks omitted), *available at* 2003 WL 22330725. The NLRB argued that AB 1889 should be preempted because it "represents California's labor policy-driven decision to use state spending power to pressure private employers to conform to the state model that conflicts with the federal model." *Id.* at 15.

Judge Beezer, joined by Judges Kleinfeld and Callahan, dissented. The dissent, reiterating several of the points made in the second panel decision, concluded that "regulation that specifically targets and substantially affects the NLRA bargaining process will be preempted, even if such regulation comes in the form of a restriction on the use of state funds." Pet. App. 51a (Beezer, J., dissenting).

SUMMARY OF ARGUMENT

AB 1889 is preempted because it regulates speech that Congress specifically determined should be unregulated. The NLRA protects and encourages noncoercive employer speech about union organizing so that employees may make an informed decision in exercising their NLRA right to join or refrain from joining a union. California, however, takes a different view: Positing that employer speech opposing union organizing efforts "interferes" with employee choice, the State has sought to stamp out such speech through a sweeping exercise of its spending power.

It is indisputable that had California sought to achieve its conflicting labor policy by directly penalizing noncoercive employer speech, such a law would be preempted. AB 1889 does not evade preemption simply because it penalizes such speech through the spending power. It is well established that a state may not leverage public money in a manner that imposes burdens that are inconsistent with the NLRA. Where, as here, a state's regulatory objective conflicts with federal policy, the means by which the state has regulated are irrelevant. Only where a state is *not* pursuing a regulatory goal, but rather is acting as a typical "private market participant" pursuing "purely proprietary interests," do its spending actions escape preemption. But it is patent—as all 15 judges on the *en banc* court agreed—that AB 1889 does not serve any such proprietary or fiscal interest. Rather, drafted and sponsored by intervenor California Labor Federation, AFL-CIO, AB 1889 is designed to further California's

labor policy of silencing allegedly "interfering" employer speech about unionization.

Agreeing with all of this, the Ninth Circuit conceded that AB 1889 would be preempted if it made employer silence on unionization a condition for the *receipt* of state funds. But it determined that the statute survived preemption because it "only" prohibited employers from *using* state funds for the federally-approved speech. The court below thought this receipt/use distinction significant because restrictions on using public funds are allegedly less onerous than complete funding cut-offs and because such restrictions have sometimes been upheld against First Amendment challenge. Neither reason makes sense.

A spending restriction need not be the *most* burdensome option possible to be preempted, and it is undisputed (and indisputable) that AB 1889 imposes real burdens on noncoercive employer speech. For the hundreds of employers in California who receive all of their revenue from the State, including Medi-Cal providers, AB 1889 imposes a complete ban on union-related speech. Such employers are forced either to engage in costly revamping of their businesses or forego their explicit NLRA right to speak. For those employers with other sources of revenue, AB 1889 imposes burdensome regulatory requirements, especially the creation of segregated accounts, which may be enforced by unions in private lawsuits for treble damages and attorney's fees. The costs and risks imposed by AB 1889 undeniably chill the employer speech that Congress and the NLRB deem essential to informed employee decision-making

about union organizing, a labor policy that this Court has repeatedly recognized and credited.

Because it is inconsistent with the NLRA, AB 1889's purported consistency with the First Amendment is beside the point. This Court's First Amendment cases, furthermore, confirm that AB 1889 imposes cognizable burdens on speech that are unsupported by any legitimate state interest. Whatever labor policies California might pursue in the absence of congressional action, it cannot use its spending power to strike a different balance than that established in the NLRA. Any other result would allow for the balkanization of labor law in the United States, with states free to pursue their own idiosyncratic labor policy goals, either in support of or in opposition to unions, simply by attaching conditions to the trillion dollars they spend annually.

ARGUMENT

I. AB 1889 IS A REGULATORY ENACTMENT INTENDED TO IMPLEMENT A CALIFORNIA LABOR POLICY THAT CONFLICTS WITH FEDERAL LAW

AB 1889 is preempted because it regulates noncoercive employer speech that Congress specifically intended to protect by leaving it free from governmental regulation. In AB 1889, California is using its spending power to foist its own labor policy of employer silence on union organizing, not to further any proprietary or fiscal interest. That regulatory purpose is irreconcilable with an employer's express NLRA right to engage in noncoercive speech, and AB 1889, in practice, undeniably interferes with the exercise of that right. Under settled preemption principles, California's

backdoor effort to alter supreme federal labor policy cannot stand.

A. A State Cannot Regulate Activities Which Congress Has Determined Should Be Unregulated

The NLRA broadly preempts states laws that "'frustrate the federal scheme.'" *Metro Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 747 (1985) (quoting *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 209 (1985)); *accord Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 614 (1986) ("*Golden State I*") (the "'crucial inquiry regarding preemption'" is whether the state law "'would frustrate effective implementation of the Act's processes'") (quoting *Machinists*, 427 U.S. at 147-48); *Hill v. Florida ex rel. Watson*, 325 U.S. 538, 542 (1945) (state law preempted if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress") (internal quotation marks omitted).

The NLRA thus "protects against state interference with policies implicated by the structure of the Act itself, by preempting state law and state causes of action concerning conduct that Congress intended to be unregulated." *Metro. Life Ins.*, 471 U.S. at 749. By prohibiting "state and municipal regulation of areas that have been left to be controlled by the free play of economic forces," preemption "preserves Congress' intentional balance between the uncontrolled power of management and labor to further their respective interests." *Bldg. & Constr. Trades Council v. Associated Builders & Contractors of Mass./R.I., Inc.*, 507 U.S. 218, 226 (1993) ("*Boston Harbor*") (internal quotation marks

omitted); *see also Local 20, Teamsters, Chauffeurs & Helpers Union v. Morton*, 377 U.S. 252, 260 (1964) (states may "not upset the balance of power between labor and management expressed in our national labor policy"); *Golden State I*, 475 U.S. at 614 ("Congress' decision to prohibit certain forms of economic pressure while leaving others unregulated represents an intentional balance between the uncontrolled power of management and labor to further their respective interests.") (internal quotation marks omitted).

Consequently, "an authoritative federal determination that [an] area is best left *un*regulated" has "as much preemptive force as a decision *to* regulate." *Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 384 (1983) (citing *Nash-Finch*, 404 U.S. at 144; emphasis in original); *accord Garner v. Teamsters, Chauffeurs & Helpers Union*, 346 U.S. 485, 500 (1953) (state impingement "on [an] area of labor combat designed to be free" is "an obstruction of federal policy"). These "settled preemption principle[s]," applicable to all state laws, have their "greatest force" with respect to a law like AB 1889, which "regulat[es] the relations between employees, their unions and their employer." *N.Y. Tel. Co. v. N.Y. State Dep't of Labor*, 440 U.S. 519, 533 (1979) (plurality op.) (internal quotation marks omitted).

In *Machinists*, this Court held that Wisconsin could not regulate a union's partial strike activity during collective bargaining negotiations because Congress intended such activity to be free from all regulation. *See* 427 U.S. at 148. As *Machinists* explains:

> An appreciation of the true character of the national labor relation policy expressed in the NLRA . . . indicates that in providing a legal framework for union organization, collective bargaining, and the conduct of labor disputes, Congress struck a balance of protection, prohibition, and laissez-faire in respect to union organization, collective bargaining, and labor disputes that would be upset if a state could also enforce statutes or rules of decision resting upon its views concerning accommodation of the same interests.

Id. at 141 n.4 (internal quotation marks omitted).

More specifically, *Machinists* holds that the "failure of Congress to prohibit certain conduct warrants a negative inference that it was deemed proper, indeed desirable at least, to be left for the free play of contending economic forces." 427 U.S. at 141 n.4 (internal quotation marks and alterations omitted). Thus, when a state "outlaws what federal law fails to outlaw; it is denying one party to an economic contest a weapon that Congress meant him to have available." *Id.* (internal quotation marks omitted). So preempting state regulation of activities that are immunized from federal regulation, such as noncoercive employer speech, serves the basic "purpose of the Act, [which] was to obtain uniform application of its substantive rules and to avoid the diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies." *Nash-Finch*, 404 U.S. at 144 (internal quotation marks omitted).

B. The NLRA Makes Clear That Noncoercive Speech Should Be Unregulated

There can be no question that noncoercive employer (and union) speech about unionization is an area that the NLRA has made clear should be unregulated and left to the "'uncontrolled power of management and labor to further their respective interests.'" *Machinists*, 427 U.S. at 146 (quoting *Morton*, 377 U.S. at 258-59).

In 1947, the Taft-Hartley Act amended the NLRA to include section 8(c), which prevents "[t]he expressing of any views, argument, or opinion, or the dissemination thereof, . . . if such expression contains no threat of reprisal or force or promise of benefit," from being considered an unfair labor practice. 29 U.S.C. § 158(c); *accord* H.R. Conf. Rep. No. 80-510, at 45 (1947) ("The purpose [of section 8(c)] is to protect the right of free speech when what the employer says or writes is not of a threatening nature or does not promise a prohibited favorable discrimination.").

As this Court has repeatedly recognized, Congress' insertion of explicit protection for noncoercive employer speech in section 8(c) "manifests a congressional intent to encourage free debate on issues dividing labor and management." *Linn*, 383 U.S. at 62; *accord NLRB v. United Steelworkers of Am.*, 357 U.S. 357, 362 (1958) (an employer's "right to [engage in noncoercive anti-union solicitation] is protected by the so-called 'employer free speech' provision of § 8(c) of the Act"). "[A]n employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a 'threat of reprisal or

force or promise of benefit.'" *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969).

Thus, section 8(c) enables employers to speak freely about unionization, just as unions may. Indeed, section 8(c) rectified prior NLRB decisions that "denied employers the opportunity to answer the attacks which often accompany organizing campaigns, and forbade them even to acquaint their workers with opinions in which they honestly believed." Archibald Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 HARV. L. REV. 1, 15 (1947). So leveling the playing field not only protects employers' right to free speech, as importantly it also vindicates employees' section 7 right to make an informed decision about whether to select an exclusive bargaining representative. *See Gissel*, 395 U.S. at 617-18; *Harlan Fuel Co.*, 8 N.L.R.B. 25, 32 (1938).

In short, "the guaranty of freedom of speech and assembly to the employer and to the union goes to the heart of the contest over whether an employee wishes to join a union. It is the employee who is to make the choice and a free flow of information, the good and the bad, informs him as to the choices available." *Southwire Co. v. NLRB*, 383 F.2d 235, 241 (5th Cir. 1967); *accord* JULIUS G. GETMAN, *ET AL.*, LABOR MANAGEMENT RELATIONS AND THE LAW 48 (2d ed. 1999) ("LABOR MANAGEMENT RELATIONS") (explaining that employees "must be given a chance to learn about the pros and cons of unionism" since the NLRA's "basic policy . . . is that employees should be free to make informed and carefully reasoned choice"). This Court has accordingly construed section 8(c) "against the background of a profound commitment

to the principle that debate should be uninhibited, robust, and wide-open." *Linn*, 383 U.S. at 62 (internal quotation marks and alterations omitted).

The NLRB—upon which "Congress conferred the authority to develop and apply fundamental national labor policy," *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 500 (1978)—has long recognized "the right of any party to inform employees of the advantages and disadvantages of unions and of joining them as long as such information is imparted to employees in a noncoercive manner." *Trent Tube Co.*, 147 N.L.R.B. 538, 541 (1964) (internal quotation marks omitted). It has accordingly held that "both parties to a labor dispute have the equal right to disseminate their point of view." *Livingston Shirt Corp.*, 107 N.L.R.B. 109, 406 (1953).

Indeed, given section 8(c), Congress' intent to preclude all government regulation of noncoercive employer speech here is even more obvious than its intent to protect the partial strikes at issue in *Machinists*. Here, Congress "focused on the problems presented" by not protecting noncoercive speech and "enacted specific legislation" which amended the NLRA to deal "with this subject matter." *Machinists*, 427 U.S. at 157 (Stevens, J., dissenting). In *Machinists*, in contrast, there was no specific NLRA provision permitting unions to engage in the self-help of partial strikes; indeed, there was "no legislative expression" of any kind suggesting "Congress' intent to leave partial strike activity wholly unregulated." *Id.*; *see also Livadas v. Bradshaw*, 512 U.S. 107, 118 n.11 (1994) ("The right to self-help upheld in *Machinists*" was "*implicit* in the structure of the Act") (emphasis added).

Thus, it is quite clear that any state effort to directly prohibit or penalize noncoercive employer speech is preempted. Such laws govern speech that Congress plainly intended to be unregulated and thereby disrupt the balance Congress struck between labor and management. They frustrate the NLRA's purpose of encouraging such speech, in order to provide a level playing field that enhances employees' informed decision-making.[1]

Similarly, they are preempted under *Garmon* and its progeny because they intrude on the NLRB's

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[1] The Ninth Circuit's extraordinary assertion that *noncoercive* employer speech in the organizing context was not intended to be "free from all regulation" under *Machinists* because the NLRB can regulate *coercive* employer speech that is "prejudicial to a fair election" has it precisely backwards. Pet. App. 19a-20a. The fact that Congress chose to prohibit, in the organizing context and elsewhere, *only* speech containing a "threat of reprisal" or otherwise unfairly prejudicing elections *confirms* that noncoercive speech is one of the "peaceful methods" available to an employer to deter unionization "free from government inference." *Machinists*, 427 U.S. at 154. By analogy, the fact that picketing designed to "coerc[e] employees" is an unfair labor practice clearly implies that "other [peaceful] picketing is to be free" from state regulation—not, as the court below would have it, that picketing is a "zone of activity" that may be regulated. *Garner*, 346 U.S. at 499-500; *see also Morton*, 377 U.S. at 258, 261 (federal law's prohibition of only "certain secondary boycott activities" preempts an Ohio law that penalizes "peaceful union secondary activities"). Indeed, under the Ninth Circuit's reasoning, the fact that the First Amendment permits regulation of "fighting words" (*see Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)) means that the Amendment did not intend to make peaceful political speech a "zone of activity" free from government regulation. Thus, the Ninth Circuit's conclusion is at war with logic as well as precedent.

primary jurisdiction to determine whether an employer's speech is noncoercive (and thus "arguably protected") or coercive (and thus "arguably prohibited"), by prophylactically prohibiting all such speech. *See Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 110 n.7 (1989) (*Garmon* preemption "avoids the potential for jurisdictional conflict between state courts or agencies and the NLRB by ensuring that primary responsibility for interpreting and applying this body of labor law remains with the NLRB.") (internal quotation marks and citation omitted). "[B]ecause the protection afforded by section 8(c) is to leave employer speech largely unregulated, in a case involving section 8(c), the *Garmon* doctrine and the *Machinists* doctrine actually tend toward the same point." *Healthcare Ass'n of N.Y. State, Inc. v. Pataki*, 471 F.3d 87, 107 (2d Cir. 2006).[2]

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[2] The *en banc* majority reasoned that noncoercive speech is not "protected" by the NLRA because section 8(c) simply immunizes an employer from liability for engaging in such speech, rather than creating a "right" for employers analogous to employees' rights under section 7 of the Act. Pet. App. 22a-23a. But, of course, the NLRA does not "protect" an *employer's* freedoms by granting them any "rights" relative to their employees. Rather, employer freedoms, such as the freedom to engage in noncoercive speech, are "protected" by the NLRA by preventing government interference with that freedom, just as the First Amendment "protects" citizens' speech by preventing "Congress" from interfering with it. *See Healthcare Ass'n*, 471 F.3d at 99.

C. States May Not Interfere With Federal Labor Policy Through The Exercise Of Their Spending Power

The only remaining question, then, is whether AB 1889 evades preemption because its regulation and penalization of noncoercive employer speech is done through the spending power. The answer is plainly no. Where, as is concededly the case here, a state seeks to advance a regulatory interest in labor policy, rather than a "purely proprietary interest" of a private "market participant," the fact that the regulatory interest is pursued through the spending power, rather than the police power, is irrelevant to the preemption analysis. *Boston Harbor*, 507 U.S. at 229, 231; *see also Gould*, 475 U.S. at 291; Pet. App. 11a.

The dispositive NLRA preemption question in this context is whether the state is imposing a condition on spending or similar benefits for the regulatory purpose of deterring activity that the Act authorizes, or is simply "managing its own property [by] pursu[ing] its purely proprietary interest . . . where analogous private conduct would be permitted." *Boston Harbor*, 507 U.S. at 231. The former use of the spending power is preempted, while the latter is not.

Where, as here, a state's regulatory objective conflicts with federal policy, it is blackletter law that the means by which the state has regulated are irrelevant—the law is still preempted. "[J]udicial concern has necessarily focused on the nature of the activities which the States have sought to regulate, rather than on the method of regulation adopted." *Garmon*, 359 U.S. at 243. In *Gould*, this Court

unanimously held preempted a Wisconsin statute debarring the State from contracting with any firm found to have violated the NLRA on three separate occasions because it imposed a "supplemental sanction" that conflicted with the NLRA's remedial regime. 475 U.S. at 288. Wisconsin attempted to defend the measure as an exercise of its spending power, but this Court found that the State was "not functioning as a private purchaser of services" because "the point of the statute is to deter labor law violations": "[F]or all practical purposes, Wisconsin's debarment scheme is tantamount to regulation." *Id.* at 287, 289 (internal quotation marks and citation omitted). Given its conflicting regulatory purpose, the Court held that Wisconsin's debarment law could not be saved simply because it was an "exercise[] of the spending power." *Id.* at 290.

In short, the fact that a state seeks to interfere with NLRA-authorized actions through its "spending power rather than its police power" is a "distinction without a difference." *Gould*, 475 U.S. at 287. Rather, the "'proper focus'" is on "'the conduct being regulated,'" not the method of regulation; it would thus "make little sense" to allow otherwise improper state interference with the NLRA's uniform scheme "simply because it operates through state purchasing decisions." *Id.* at 289 (quoting *Lockridge*, 403 U.S. at 292).

Thus, this Court has found governmental action preempted in a wide variety of contexts where the state policy was implemented through withholding of financial or other benefits, rather than through the police power. As the Court, again unanimously, explained in *Livadas*, a "state rule predicating

benefits on refraining from conduct protected by federal labor law poses special dangers of interference with congressional purpose." 512 U.S. at 116. Thus, the Court held that California's decision to not award three days' pay to an employee that she was otherwise entitled to under state law, because she was subject to a collective bargaining agreement requiring arbitration, was preempted. California's decision to provide the employee with an "unappetizing choice" between foregoing a statutory right or enjoying the benefits of a collective bargaining agreement would, "if not preempted, 'defeat or handicap a national objective by . . . withdrawing state benefits . . . simply because an employee engages in conduct protected and encouraged by the NLRA.'" *Id.* at 116-17 (quoting *Nash v. Fla. Indus. Comm'n*, 389 U.S. 235, 239 (1967)). In *Nash*, the Court had earlier held preempted a Florida law that denied unemployment insurance to those employees who filed unfair labor practice charges against their employers. *See* 389 U.S. at 239.

Similarly, Los Angeles' decision to condition a taxicab franchise renewal on the company's settlement of a labor dispute was held preempted. *Golden State I*, 475 U.S. at 616. The City's condition "thwarted" the bargaining process that the NLRA "leaves largely to the parties," *id.* at 615, impermissibly restricting the company's "ability to resist a strike," *id.* at 618, regardless "whether the City's action favors one side or the other" in the dispute, *id.* at 619. The Court rejected the City's argument that it was "not regulating labor" because the interference came in the form of the "traditional municipal function [of] issuing taxicab franchises,"

noting that *Gould* had rejected a "similar argument . . . that a State's spending decisions are not subject to preemption." *Id.* at 618. Outside the labor law context, this Court has reaffirmed that "the fact that the State 'ha[s] chosen to use its spending power rather than its police power' d[oes] not reduce the potential for conflict with the federal statute." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 374 n.7 (2000) (quoting *Gould*, 475 U.S. at 288-89).

These precedents instruct that it is impermissible for a state to leverage public money or other benefits to impose burdens that are inconsistent with, or go beyond, the proscriptions of the NLRA. On the other hand, if a state is not pursuing a regulatory interest, but simply acting as a "market participant" pursuing "purely proprietary interests" that would be pursued by private actors, its actions are not preempted simply because those interests affect labor-management relations. *Boston Harbor*, 507 U.S. at 229, 231.

In *Boston Harbor*, this Court, quoting then-Chief Judge Breyer, upheld Massachusetts' decision to require all bidders on a state project to agree to enter into prehire agreements expressly authorized by the NLRA, because "it was acting in the role of purchaser of construction services, act[ing] just like a private contractor would act, and condition[ing] its purchasing upon the very sort of labor agreement that Congress explicitly authorized and expected frequently to find." *Id.* at 233 (internal quotation marks and citations omitted). There is little concern with interference with federal law, this Court held, "when the State acts as a market participant *with no interest in setting policy*." *Id.* at 230 (emphasis

added); *accord id.* at 231 (a state has leeway "manag[ing] its own property when it pursues its *purely proprietary interests*, and where analogous private conduct would be permitted") (emphasis added). Because Massachusetts' bid requirement was "specifically tailored to one particular job" and was designed "to ensure an efficient project that would be completed as quickly and effectively as possible at the lowest cost," the Court determined that it was "acting as a proprietor rather than regulator." *Id.* at 228. The Court reasoned that because "a private purchaser may choose a contractor based upon that contractor's willingness to enter into a prehire agreement, a public entity *as purchaser* should be permitted to do the same." *Id.* at 231 (emphasis in original).

II. AB 1889 FURTHERS CALIFORNIA'S LABOR POLICY, NOT ANY PROPRIETARY OR FISCAL INTEREST

Here, the *en banc* court unanimously concluded that AB 1889 is "regulatory and . . . not protected by the market participant exception." Pet. App. 11a; *see also* Pet. App. 51a (Beezer, J., dissenting); *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 498 F.3d 1031, 1048 (9th Cir. 2007) (noting that "[AB 1889] quite plainly functioned as regulatory rather than propriety action"). It so found because the statutory language "makes clear that the legislation's purpose is to prevent 'state funds and facilities' from being used to subsidize an employer's attempt to influence an employee's choice about whether to join a union" and "does not purport to reflect California's interest in the efficient procurement of goods and services, as measured by the similar behavior of

private parties." Pet. App. 11a. It also noted that the statute's "broad scope indicates a general state position of neutrality with regard to organizing, not a narrow attempt to achieve a specific procurement goal." Pet. App. 12a. The Ninth Circuit's unanimous interpretation of AB 1889 as serving only a regulatory interest in labor policy, rather than any proprietary interest, is compelled by the statute's plain language and overall scheme.

The statute does not contain any hint that any proprietary or fiscal interest is being furthered. To the contrary, the plain text of the statute unequivocally states that when an employer "deter[s] union organizing," this "*interfere[s]* with an employee's choice about whether to join or be represented by a labor union" and since such interference is contrary to "the *policy* of the state," AB 1889's spending restriction is imposed. Cal. Stats. 2000, Ch. 872, § 1 (emphasis added). Thus, California's labor policy is that employers' discussion of unionization somehow interferes with employee choice, so the State seeks to deter such harmful speech. In contrast, federal labor policy is that presenting *both* sides of an "uninhibited, robust debate" about unionization *enhances* employee choice by facilitating fully-informed decision-making. *Linn*, 383 U.S. at 62 (internal quotation marks and citation omitted). In short, on its face, AB 1889 indisputably evinces a labor regulatory policy—one diametrically opposed to that of the NLRA. This is hardly surprising since AB 1889 was sponsored by Assemblyman Gil Cedillo, a former Service Employees International Union ("SEIU") officer; was authored by the counsel of record for intervenor California Labor Federation, AFL-CIO; and passed

on a strict party line vote. *See* J.A. 306; THE STATE OF CALIFORNIA LABOR at 159 n.6, 166.[3]

California is plainly not "neutral" on the question of noncoercive employer speech—it is firmly opposed to it. Due to this opposition, California seeks to render publicly-funded *employers* "neutral" on unionization by using its spending power to keep them out of this debate. *See Machinists*, 427 U.S. at 156 n.* (Powell, J., concurring) ("State laws should not be regarded as neutral if they reflect an accommodation of the special interest of employers, unions, or the public in areas such as employee self-organization, labor disputes, or collective bargaining."). The State is therefore undeniably using its spending power to regulate employer speech to induce "employer neutrality" (Pet. App. 17a) so as to favor labor in the debate over unionization, not because it believes that employer speech costs California money or diminishes the efficacy of publicly-funded services.

The statute's other provisions underscore that California has no concern, fiscal or otherwise, with "subsidizing" discussions about unionization, but is concerned only with *employers* discussing the issue. For example, AB 1889 authorizes and encourages

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[3] The unions' efforts to enact AB 1889 are reminiscent of the effort by the employer in *Machinists* to enjoin its union from refusing to work overtime: "The employer in this case invoked the Wisconsin law because it was unable to overcome the Union tactic with its own economic self-help means." 427 U.S. at 148. But *Machinists* instructs that whatever the NLRA-related labor relation difficulties of either employers or unions might be, they "cannot justify state aid contrary to federal law." *Id.* at 149.

using public money to allow a union access to the workplace to discuss the benefits of organized labor. *See* Cal. Gov't Code § 16647(b). But AB 1889 forbids any rebuttal to the union by a supervisor paid with funds derived from the state. *See id.* § 16646(a). Similarly, hiring a consultant to oppose a union attempting to become the exclusive representative under a collective bargaining agreement is prohibited, *see id.*, but paying a consultant to "negotiat[e]" or "administer[]" such a bargaining agreement is encouraged, *id.* § 16647(a). And, perhaps most tellingly, employer expenditures designed to deter employees from selecting a union are forbidden, *see id.* § 16646(a), while expenditures to voluntarily recognize a union are encouraged, *see id.* § 16647(d).[4]

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[4] Since these exemptions allow any employer effort to "assist" or "promote" unionization, they render AB 1889's supposed prohibition of such pro-union speech meaningless—all that is left is the prohibition against speech to "*deter* union organizing." Cal. Gov't Code §§ 16645.2, 16645.7. Of course, this fig leaf of neutrality is otherwise meaningless because employers are rarely inclined to *promote* unionization, and certainly not sufficiently inclined that the State needs to affirmatively stop them from doing so. And even if the ban on employer speech did apply to both pro- and anti-union speech, this would still not make AB 1889 "neutral" on noncoercive employer speech or eliminate its conflict with section 8(c). AB 1889 still singles out only *employer* speech for disability and is thus hardly neutral. Section 8(c), moreover, protects the "expressing of *any* views" about unionization, favorable or unfavorable, so AB 1889's deterrence of such speech still clashes with that federal labor provision. 29 U.S.C. § 158(c). Presumably for all of these reasons, the Ninth Circuit did not attach any significance to that part of AB 1889 which references "assist[ing]" or "promot[ing]" unionization.

The statute's authorization of public funds to facilitate, but not to discourage, unionization belies any notion that AB 1889 reflects any belief that using state-derived funds in connection with unionization somehow negatively affects California's treasury or the effective delivery of public services. Rather, this viewpoint-based discrimination vividly confirms that the perceived evil being addressed is federally-authorized employer speech, not any sort of proprietary issues that would motivate a private actor.

Equally revealing is that AB 1889 prohibits noncoercive employer speech even where public funds—and thus potential cost savings—are inherently not implicated. That is, section 16645.5 of the California Government Code imposes a civil penalty on concessioners or other employers "conducting business on state *property*" if they "deter union organizing" on "state property." This obviously cannot save California any money or produce any efficiencies because the rent paid by concessioners is not affected by their union speech and concessioners are not using any state money to run their businesses. This provision thus further confirms that AB 1889 is indifferent to financial concerns, but is simply using state benefits as a weapon to coerce employer silence.

III. AB 1889 IMPERMISSIBLY BURDENS SPEECH THAT THE NLRA PROTECTS

The foregoing clearly establishes that a labor policy "purpose" is the only one that can "credibly be ascribed" to AB 1889 and the State is not acting as a private market participant. *Gould*, 475 U.S. at 287. That being so, AB 1889 is clearly preempted under the well-established principle that

use of the spending power for a labor policy purpose is impermissible regulation. The Ninth Circuit, as noted, fully agreed that the "market participant" exception was inapplicable and, indeed, also agreed that California could not achieve this labor policy goal under *Gould* by making "employer neutrality . . . a condition for the *receipt* of state funds." Pet. App. 17a (emphasis in original); *see also* Respondents' Brief in Opposition 22.

The *en banc* majority nevertheless concluded that California's use of the spending power to achieve its labor policy goal was somehow not preempted because the funding condition only "restrict[s] the *use* of state funds" after they are received by the employer. Pet. App. 17a (emphasis in original). Although its reasoning was quite opaque, the Ninth Circuit apparently thought this distinction dispositive because such "use" restrictions (1) allegedly have some beneficial financial effect; (2) purportedly impose a lesser burden on noncoercive employer speech than would a *Gould*-like funding cut-off; and (3) have sometimes been found to comply with the First Amendment. Pet. App. 18a-19a, 32a-33a. All of these assertions, however, are untrue and/or irrelevant to the preemption analysis.

A. Any Fiscal Effect Of AB 1889 Is Incidental To Its Purpose Of Altering Federal Labor Policy

1. Like California's "late-blooming" effort in *Livadas* to defend the policy there as "animated simply by the frugal desire to conserve the State's money," the California Attorney General's effort here to cobble together a fiscal rationale for AB 1889 does not have "any tether to [the] California law" at issue. 512 U.S. at 127, 129. No amount of clever advocacy

can disguise the fact that AB 1889, on its face, is designed to leverage state money to deter employer speech that the NLRA views as valuable, not to further any fiscal interest in avoiding the waste of public resources. Any legitimate *fiscal* interest in "ensuring that program funds [are] use[d] for the purpose they were given" (Pet. App. 17a) is more than served by the standard requirement, in California and elsewhere, that public funds may go only toward grant-related purposes and expenses. *See, e.g.*, Cal. Health & Safety Code § 25299.105(b); J.A. 308 ("Nonprofits that receive contracts and/or grants from the state of California are not allowed to use those funds for anything other than the stated purpose of the contract and/or grant."); *accord* 2 C.F.R. § 215.21(b)(3) (grant recipients "shall adequately safeguard all [funds, property, and other assets] and assure that they are used solely for authorized purposes"). If expenditures involving employee relations are permissibly included in program-related expenses chargeable to the State, this reflects the State's fiscal decision that such indirect costs efficiently further programmatic purposes and should be reimbursed. Conversely, if the State generically and neutrally excludes costs relating to employee relations from programs and grants, then the private actors have never *received* any money related to the employer's speech about unionization, so restricting the employer's *use* of public funds for such speech cannot prevent wasteful "subsidization," since that speech was never "subsidized" in the first place. *See Healthcare Ass'n*, 471 F.3d at 104 (a state can accomplish its goals of "mak[ing] sure that [it] does not end up paying labor costs" and "saving money" by "limiting the kind of

costs for which it will reimburse program participants").[5]

For example, a restriction against a health-care provider including unrelated costs (*e.g.*, the cost of a computer consultant) in a reimbursement form requesting $5,000 for performing an appendectomy presumably serves the state's fiscal interest. But the state, having excluded the unrelated cost of the computer consultant from the reimbursement, has no financial interest in telling the health-care provider he cannot *spend* the $5,000 it receives for performing that appendectomy on a computer consultant. The state's $5,000 reimbursement is not increased or affected in any way if that money is spent on a computer consultant; the state is out $5,000, and only $5,000, *regardless* how the money is spent. The same is true of AB 1889's prohibition against *using* state funds to pay a consultant on union organizing.

In short, since the State has achieved its fiscal interest by limiting public monies to whatever activities it deems related to the purpose of the government-funded program, the State has no additional fiscal interest in telling private recipients how to spend the money they fairly received in exchange for providing this public service. The only

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[5] If the private recipient is paid a *fixed price* for a particular service, then the State plainly has no conceivable fiscal interest in how that money is *spent*, since the State's payment remains the same regardless. Even AB 1889 recognizes that such arrangements do not affect the public fisc since it expressly exempts "a fixed-price contract or . . . any other arrangement by which the amount of payment of state funds does not depend on the costs incurred by the state contractor" from the ban on reimbursements. Cal. Gov't Code § 16645.1(d).

purpose of AB 1889, then, is to leverage state-provided funds to create a gratuitous barrier to employers engaging in federally-approved speech.[6]

2. The absence of any fiscal purpose underlying a spending restriction is particularly obvious where, as here, it singles out a particular activity to prohibit but places no similar restriction on activities with similar effects and the restriction has no nexus to the state's programmatic goals. In such circumstances it is crystal clear that the additional, specific restriction is not designed to achieve any economies, but to further a public policy unrelated to cost savings. Thus, for example, a spending restriction on abortion, among all medical procedures related to childbirth, does not reflect any fiscal purpose, even though it has the effect of reducing public outlays, but obviously constitutes a "value judgment favoring childbirth

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[6] In lobbying for AB 1889, intervenor California Labor Federation, AFL-CIO, argued that the bill would "ensure that state funds are not wasted on expensive anti-worker campaigns." J.A. 312. Picking up on this notion, the *en banc* majority hypothesized a grant where hospitals are given money to hire more nurses and theorized that AB 1889 might prevent the "effectiveness of [this] grant [from] being diminished by funding a campaign to convince nurses not to unionize." Pet. App. 31a n.18. This cannot be the purpose of AB 1889, however, because, again, general procurement principles prevent the hospital from improperly diverting the funds earmarked for paying nurses to other uses and, more tellingly, because AB 1889 does not seek to "diminish the effectiveness" entailed in a hospital expending funds for a campaign *encouraging* nurses to unionize. Thus, to the extent AB 1889 incorporates the belief that an anti-union campaign "wastes," or "diminishes the effectiveness" of, state expenditures, it is necessarily premised on the labor policy view that noncoercive employer speech is a disruptive interference, not on any fiscal policy.

over abortion," just as AB 1889's singling out of only *employer's* union-related speech reflects the "value judgment" that such speech "interferes" with employee choice. *Maher v. Roe*, 432 U.S. 464, 474 (1977); *cf. Lyng v. Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am.*, 485 U.S. 360, 373 (1988) (interest in protecting fiscal integrity of governmental programs "does not mean that Congress can pursue the objective of saving money by discriminating against individuals or groups"). Indeed, no case involving a general funding restriction on a particular activity has suggested that funding riders serve a proprietary, as opposed to policy, function.

The absence of a fiscal purpose is even clearer where, as here, the restriction is attached to *all* monies for *any* purpose, and therefore plainly is not designed to achieve any program-specific effectiveness or cost savings. For example, even if the government may exclude reimbursement for certain types of lawsuits from a legal services program, or abortion reimbursement from a Medicaid program, this does not suggest that it may prohibit law firms from financing such suits with unrelated legal fees from the state or prohibit welfare recipients or public employees from spending "publicly-derived" funds for an abortion. *Cf. Rust v. Sullivan*, 500 U.S. 173, 194 (1991).

Thus, AB 1889 is plainly an impermissible effort at labor regulation under *Gould* even if it could have some indirect fiscal effect. As this Court has frequently emphasized, in "labor preemption cases" the question is not "the reasonableness of state policy," but simply whether an otherwise

"reasonable" policy "stands as an obstacle to the accomplishment and execution of the full purposes and objectives" of the federal law. *Livadas*, 512 U.S. at 120. Although "a state legislature has an undoubtedly rational and 'legitimate' interest in raising revenue," a state tax that serves that legitimate goal is nevertheless prohibited if the "power to tax" is improperly used to "destroy" constitutionally protected activity or, as here, to frustrate federal labor policy. *Id.* The same is true of the spending power, which is why the Court has held preempted state actions that frustrate federal labor policy, even though they also advance reasonable fiscal interests unrelated to labor relations and even though they are "neutral" between labor and management.

Thus, in *Golden State I*, the Court found that using the taxicab franchise renewal to induce settlement of a labor dispute was "regulating labor" under *Gould*, 475 U.S. at 618, even though it served the City's obvious non-labor interest in "putting . . . taxis back on the streets," *id.* at 622 (Rehnquist, J., dissenting), and "could easily have been redescribed as following a 'hands off' policy [of] . . . avoid[ing] endorsing either side in the course of a labor dispute," *Livadas*, 512 U.S. at 129. Similarly, in *Nash*, the policy of not paying unemployment compensation to an employee who might receive a duplicative back-pay award if he prevailed on his unfair labor practice charge served Florida's monetary interest of not providing the employee a "windfall" or of avoiding the burden and expense of seeking to "recoup compensation payments made during [the] period covered by [the] back-pay award." 389 U.S. at 239 n.4. This policy was nonetheless preempted even though the

"commission in *Nash* may have understood its policy as expressing neutrality between the parties in a yet-to-be-decided unfair labor practice dispute." *Livadas*, 512 U.S. at 129. And, of course, Wisconsin in *Gould* was not pursuing a policy that was in *conflict* with the NLRA, but was simply *reinforcing* prohibitions of federal labor law through additional sanctions designed "to deter labor law violations and reward fidelity to the law." 475 U.S. at 287 (internal quotation marks and citation omitted).

This case is thus far easier than all of those where the Court has found that the withholding of benefits was preempted, because AB 1889's plain and avowed policy of cutting off funds for noncoercive employer speech is neither "neutral" nor consistent with the NLRA and, "for all practical purposes, ... is tantamount to [labor] regulation." *Gould*, 475 U.S. at 289.[7]

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[7] The *en banc* court cited three *federal* statutes imposing spending restrictions related to union organizing as "'evidence that Congress does not view such a restriction as incompatible with its labor policies.'" Pet. App. 21a (quoting *De Veau v. Braisted*, 363 U.S. 144, 156 (1960) (plurality op.)). These provisions, however, mean only that a majority of Congress in the 1990s, in three of the countless number of federal spending programs, imposed funding restrictions affecting employer speech. It cannot plausibly be argued that these *ad hoc* federal funding statutes somehow implicitly repealed, or altered the meaning of, the NLRA. *See Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 189-190 (1978) (discussing the "cardinal rule" against repeals by implication, which is overcome only where there is "a positive repugnancy" between the two laws or where congressional intent to repeal is "clear and manifest") (internal quotation marks omitted). Nor can these federal laws be read to otherwise somehow condone AB 1889. In stark contrast, the (cont'd...)

B. AB 1889 Interferes With The Federal Scheme By Burdening And Deterring Noncoercive Employer Speech

The Ninth Circuit attached talismanic significance to its bald assertion that AB 1889's prohibition against *using* state-derived funds to engage in union-related speech is less draconian than *denying* funds to organizations who engage in that speech. Pet. App. 17a-18a. But the question is not whether the state has imposed the *maximum possible* spending burden on federally-protected activities, but whether a cognizable burden has been imposed on such activity. It cannot be disputed that AB 1889's funding restriction imposes a real barrier to protected employer speech and, indeed, is in many ways as disruptive of the federal scheme as a straightforward funding cut-off.

As a threshold matter, AB 1889 obviously will have a "real effect," *Livadas*, 512 U.S. at 119, on employer speech opposing unionization. Otherwise, unions would not have lobbied for it and California would have not thought that it would discourage employers

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(...cont'd)

state law at issue in *De Veau* implemented an interstate compact which Congress had to approve, which Congress did approve in the face of arguments that the law "unduly interfered with federal labor policy" and, unusually, with specific reference not only to the compact, but its implementing laws. 363 U.S. at 154. Thus, for all intents and purposes, the law in *De Veau* was a *joint* federal and state enactment and, at a minimum, placed a specific congressional imprimatur on the state law, which these three isolated provisions obviously do not do for AB 1889.

from "interfering" with employee choice. Indeed, the Ninth Circuit expressly found that AB 1889 was "distinct from" a restriction found not to be preempted in a prior case precisely because the restriction here *did* "have some 'real effect' or practical economic impact on the employer." Pet. App. 12a n.6 (citation omitted).

The Ninth Circuit's acknowledgement that the restriction here has some deterrent effect should have ended the inquiry and led to a finding of preemption. Any state labor policy that frustrates or is an obstacle to the integrated federal scheme is preempted. *See* Part I, *supra*. Deterring federally-authorized activity plainly has such an effect. Indeed, there is no reasonable basis for denying that AB 1889 imposes a burden. It prevents using any funds derived from the State to support speech disfavored by the State. The Court has routinely characterized such measures as "substantial restriction[s]," *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 544 (2001), even where the grantee could engage in the prohibited activity with non-public funds placed in "affiliate organizations," *id.* at 556 (Scalia, J., dissenting).

Of course, for both a *Gould*-like funding cut-off and the "use" restriction here, the *degree* of the burden will depend, as a threshold matter, on how much of the private actor's revenue is derived from the public fisc. If an entity derives a relatively small and easily replaceable amount of funds from the state, then a funding cut-off as in *Gould* will have little effect on the recipient's practices. Conversely, if an entity receives all or virtually all of its revenues from the state, then both the *Gould*-type cut-off and the use

restriction here will operate as a complete ban on the disfavored activity. For example, Petitioner Zilaco, Inc., receives over 90% of its revenue from Medi-Cal, and 500 other identified employers, such as United Cerebral Palsy, receive *all* their revenues from Medi-Cal. J.A. 153, 166, 301. Thus, they simply do not have sufficient non-state funds to engage in noncoercive employer speech. For these entities, then, AB 1889 operates as a total ban on federally-protected speech, no different than an outright prohibition.

Incredibly, the Ninth Circuit's complete answer to this undisputed economic reality was simply to embrace the "long[-]rejected Justice Holmes' . . . dictum" about a policeman's right to talk politics, contending that a state-funding recipient "may have an [NLRA] right to talk [about unions], but he has no . . . right to be a [recipient]." *Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668, 674 (1996); *see id.* ("[T]he similarities between government employees and government contractors with respect to [free speech rights] are obvious."). Specifically, the Ninth Circuit dismissively asserted that AB 1889's effect on entities without private funds is of no concern because "nothing prevents the employer from raising additional funds from a non-state source." Pet. App. 18a. By the same token, no governmental restriction "prevented" the contractors in *Gould* or the grantees in *Velazquez* from eliminating or ameliorating the harsh effect of those funding restrictions by raising all or some of their funds from private sources. But that truism did not change the fact that the funding restrictions imposed a serious burden on protected activity if the recipient either maintained the *status quo* or if it sought to shift its revenue sources to

private entities, since such a change from its profit-maximizing business plan would impose obvious economic costs. Indeed, the negative economic effect of raising non-state revenues, particularly in an area such as Medi-Cal where private funds are scarce, may well exceed the financial burden imposed by a civil penalty or fine.

The basic point, however, is that the state has no authority to apply this economic pressure (whatever its ultimate scope) by forcing on recipients an "unappetizing choice" between sacrificing their rights under federal labor law or diminishing their fairly-earned state revenues. *Livadas*, 512 U.S. at 117. If the loss of three days' wages in *Livadas* was too "unappetizing" to be forced to swallow, the sacrifice imposed on recipients by the Ninth Circuit is plainly beyond the pale. Indeed, if the raw ability to avoid a regulation's impact through economically counter-productive actions defeated preemption, then *direct* regulation by California would never be preempted because, of course, "nothing prevents" businesses from leaving the State and escaping California's regulatory reach.

Moreover, with respect to recipients who do have sufficient non-state funds to engage in union-related speech, AB 1889 also imposes serious burdens. California's then-Governor Davis recognized this when he vetoed AB 1889's predecessor, Assembly Bill No. 442, because "[t]his legislation has the potential to impose an unreasonable burden on business that they would have to maintain minutely-detailed records to track goods, services and funds received from the State in order to avoid violating the provisions contained therein." J.A. 119. Unlike a

Gould-like cut-off, a "use" restriction like that here has an *ongoing* debilitating effect on the recipient's activities, because it requires the recipient to keep track of "public" funds and ensure that they are not used for the proscribed purpose. Here, if an employer commingles state and other funds, *any* union-related expenditure violates AB 1889 because the statute "presumes" that any such expenditures "derive in part from state funds." Pet. App. 4a-5a (citing Cal. Gov't Code § 16646(b)). Thus, "in order to engage in union-related speech," employers are "required to maintain separate accounts for state funds and non-state funds." Pet. App. 132a (first panel opinion); *see also* Pet. App. 43a-46a (Beezer, J., dissenting); Pet. App. 62a (second panel opinion).

In other contexts where an entity is required to segregate "tainted" money that cannot be used for certain purposes—such as the federal election law requirement to segregate "corporate" and "PAC" money—the Court has unequivocally held that such segregation "burden[s] expressive activity," *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 658 (1990), and "makes engaging in protected speech a severely demanding task" that "burdens First Amendment rights," *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 255-56 (1986) (invalidating requirements to "establish a 'separate segregated fund'" and to comply with "[detailed] record-keeping and disclosure obligations"). While the Court has sometimes upheld such segregation requirements if "justified by a compelling state interest," *Austin*, 494 U.S. at 658, and sometimes invalidated them, *see Mass. Citizens for Life*, 479 U.S. at 255-56, all cases are united in acknowledging the obvious point that such segregation is clearly a serious "disincentive" to

speech, *Austin*, 494 U.S. at 658; *see also FEC v. Wis. Right to Life, Inc.*, 127 S. Ct. 2652, 2671 n.9 (2007) (opinion of Roberts, C.J.) (noting that "PACs impose well-documented and onerous burdens"); *McConnell v. FEC*, 540 U.S. 93, 205 (2003) (opinion of Stevens and O'Connor, JJ.) (evaluating, with respect to a segregated-fund requirement for electioneering communications, "whether a compelling governmental interest justifies that burden").

Moreover, here, unlike the campaign finance cases, the employer not only needs to separate funds, but also needs to establish a tracking system to closely monitor all union-related activities, in order to determine how to "allocate" an appropriate amount of employee salaries, etc. to the "private funds" account. A few examples should suffice to establish the burdensome and Byzantine nature of the segregation that is required to comply with AB 1889.

As a threshold matter, if it is even possible that there will be any discussion of unionization, the employer needs to prophylactically establish a separate private-fund account to have monies for dealing with this eventuality. *See* Cal. Gov't Code §§ 16645.2(c), 16645.7(b), 16646(b). How much money to set aside poses a vexing issue both in terms of liquidity (*i.e.*, tying up funds that it might use for other purposes) and liability (*i.e.*, facing a union lawsuit if it fails to set aside sufficient funds to cover the salaries of those engaged in noncoercive speech).

More important, the employer must then determine how to measure and account for the time each employee spends on prohibited union-related activities. For all employees discussing unionization at the employer's behest, the recipient must pay a

percentage of the employee's income out of the "private" account. Even apart from the fact that many employees do not keep detailed time records, it will be quite difficult to arrive at a correct percentage. For example, if a supervisor spends 10% of his time on union-related activity, is it enough to pay 10% of his *salary* out of the private account, or must it be 10% of all income, including year-end bonus and stock options? If the latter, how can this be done until the year-end bonus or options are paid? Does the employer need to allocate salaries of *all* employees "who are required to attend anti-union meetings" by the employer (J.A. 226), or just the salaries of the supervisory employees who are speaking for the employer at the meeting? The Attorney General believes that all salaries need be apportioned, and has sought to impose this requirement through onerous discovery. J.A. 139, 150, 239. What about a meeting where attendance is "voluntary" but is done on company time and employees have an incentive to attend? What is the proper allocation of overhead and utilities for the facilities used to discuss unionization?

It is little wonder that the record contains numerous affidavits from employers stating that AB 1889 would require them "to fundamentally and substantially alter their financial accounting and record-keeping practices and procedures." J.A. 135; *accord* J.A. 158, 168. Indeed, as several employers attested, the "burden and cost associated with [the administrative] change was so extreme that . . . we could not afford it." J.A. 158; *accord* J.A. 163, 168.

AB 1889 makes no provision for a clarifying regulation, and it is difficult to imagine a set of

regulations that would address all of the practical and intricate issues AB 1889 raises. Its enforcement mechanism, moreover, ensures that all judgment calls will be litigated with intrusive discovery into sensitive financial and business records, and that any judicial second-guessing of the employer's judgment will result in significant penalties.

AB 1889 authorizes taxpayer lawsuits, which may be brought by unions to gain leverage in an ongoing organizing dispute with an employer. A union can hale an employer into court simply by alleging that the employer's recordkeeping is "[in]sufficient," a critical term that AB 1889 does not define. At that point, the employer is faced with the legal costs of defending itself, and the near-certainty of a discovery request into its financial and business records. As this Court has previously recognized, the threat of litigation concerning protected speech—where the speaker "must bear the costs of litigation and the risk of a mistaken adverse finding by the factfinder"—"must necessarily chill speech" and "reduce the quantity of expression." *Riley v. Nat'l Fed. of Blind of N.C., Inc.*, 487 U.S. 781, 794 (1988) (internal quotation marks and alterations omitted); *Wis. Right to Life*, 127 S. Ct. at 2666 (opinion of Roberts, C.J.) ("the threat of burdensome litigation" will "chill[] speech"). More important, the employer faces the prospect of *treble* damages payable to the State and an award of attorney's fees. "The very idea of treble damages reveals an intent to punish past, and to deter future, unlawful conduct." *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639 (1981); *see also Tull v. United States*, 481 U.S. 412, 422 n.7 (1987) ("the remedy of civil penalties is similar to the remedy of punitive damages"). But "[p]unitive

sanctions are inconsistent . . . with the remedial philosophy of the NLRA[.]" *Gould*, 475 U.S. at 288 n.5 (citation omitted); *see also id.* ("The regulatory scheme established for labor relations by Congress is 'essentially remedial.'").

This chilling effect is particularly acute here because the unions that drafted AB 1889 are ready-made and highly motivated plaintiffs for these taxpayer lawsuits. Before AB 1889 was enjoined, unions wrote to the Attorney General requesting investigations of employer expenditures in more than a dozen union organizing campaigns. J.A. 170-232. The evident purpose of these letters was to induce employer "neutrality."

- At the request of SEIU, which was attempting to organize the workers of the Santa Monica Convalescent Centers (J.A. 170-72), the California Attorney General demanded that the Convalescent Centers produce records relating to fees for consulting advice; the salaries of supervisors who met with employees; the salaries of employees who attended those meetings; and printing, mailing, or other costs related to meeting documents (J.A. 138-40). Five days later, SEIU also filed suit against the Convalescent Centers in Los Angeles County Superior Court with respect to approximately $900 in disputed expenditures. J.A. 136; *accord* J.A. 141-48. The case ultimately settled, with SEIU receiving $13,000 in legal fees. J.A. 136.

- Teamsters Local 952 wrote to Laidlaw Transit Services, a contractor providing transportation services for the Orange County Transportation Authority, speculating that Laidlaw "may" have violated AB 1889 in opposing the Teamsters'

organizing campaign, but that "[t]he Union is willing to settle these potential violations, amicably without resort to litigation, if a neutrality agreement can be worked out for the upcoming NLRB election." J.A. 216. When Laidlaw demurred (J.A. 213-14), the Teamsters contacted the Attorney General to pursue an AB 1889 investigation against Laidlaw. J.A. 211-12.

• An attorney for "the largest Union-side labor law firm on the West Coast" discussed the importance of these pressure tactics in a letter to a California Deputy Attorney General. J.A. 235-36. Noting that "several unions in Sacramento Valley have been sending letters to the Attorney General's Office" about possible violations of AB 1889, the attorney explained that the failure of petitioners' challenge to AB 1889 (then pending in the district court) "will have a significant positive effect on various organizing drives that are going on here in the valley." J.A. 236.[8]

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[8] The *en banc* majority blithely dismissed these burdens in a footnote, citing the declaration of an accountant, Nicholas Roth, submitted by respondents for the proposition that AB 1889 "impose[s] no burden greater than numerous other common grant restrictions." Pet. App. 5a. But Mr. Ross' declaration addresses *only* AB 1889's "accounting and recordkeeping requirements" and makes no reference to AB 1889's *qui tam* provision or its imposition of civil penalties. J.A. 280-83. It also completely ignores the requirement that a grantee establish separate, segregated accounts and duplicate employee payroll systems. These additional, costly, and punitive requirements are unnecessary to ensure that grant funds are not misspent and clearly go beyond the general requirements imposed on federal grantees as described in Mr. Ross' declaration. J.A. 282.

The effect of AB 1889, in sum, follows its labor policy purpose: It discourages employers from speaking about unionization and thereby suppresses speech that Congress has determined should be encouraged.

Indeed, AB 1889 would seem to have a more profound and direct negative impact on the federal labor scheme than the funding cut-off preempted in *Gould*. The only deterrent effect of the cut-off there was the *incremental* deterrence attributable to adding that state sanction to the NLRA penalties for the employer's unfair labor practices. And, of course, deterrence there was *desirable* because the activities penalized were violations of the NLRA. Thus, the only interference with the federal scheme in *Gould* was whatever potential inconsistency was caused by adding the state's remedies to those of the integrated federal scheme. This relatively diffuse and intangible interference was thus far less meaningful than the direct damage caused by AB 1889.

C. First Amendment Precedents Only Confirm That AB 1889 Impermissibly Burdens Speech

In the face of all this, the Ninth Circuit nevertheless found that AB 1889 was not preempted because it purportedly did not violate the First Amendment. As the Court has repeatedly explained, however, the constitutionality of a state policy says virtually nothing about whether the policy is preempted. *See Gould*, 475 U.S. at 289 ("What the Commerce Clause would permit States to do in the absence of the NLRA is an entirely different question from what States may do with the Act in place."); *Livadas*, 512 U.S. at 107 ("Such reasoning mistakes our standard for validity under the Equal Protection

and Due Process Clause for what the Supremacy Clause requires."). The fact that the purpose and effect of AB 1889 might be permissible under the First Amendment in no way suggests that its purpose and effect are not preempted under the NLRA.

For the reasons established, AB 1889's purpose is facially preempted because it establishes a regime that deters activity protected by federal labor policy. The cases examining whether different state "value judgments" conflict with the First Amendment can shed no light on this statutory question. Certainly nothing in the First Amendment cases suggests that California's purpose here was permissibly "proprietary" because none of those cases suggests that the funding restrictions involved served such a purpose and, in any event, the Ninth Circuit correctly found that AB 1889 did not serve any such purpose. In light of this, AB 1889's alleged compliance with the First Amendment is entirely beside the point.

To be sure, the First Amendment cases reaffirm the truism that, within certain bounds, a government is "entitled to define the limits of [a] program" that it "establishes." *Rust*, 500 U.S. at 194; *but see Velazquez*, 531 U.S. at 547 ("Congress cannot recast a condition on funding as a mere definition of its program in every case, lest the First Amendment be reduced to a simple semantic exercise."). But this is true, of course, only if the government has the authority to "establish" the policy advanced by the funding restriction. Although California, "in the absence of the NLRA," would obviously have authority to encourage "employer neutrality" on unionization, it has no authority to strike a different balance than the federal statute. *Gould*, 475 U.S. at

290. Thus, AB 1889 is flawed at the threshold level *before* reaching the question examined in the First Amendment cases of whether funding restrictions place impermissible constraints on constitutionally-protected speech. Unlike the First Amendment, the Supremacy Clause in this context does not protect employers' right to speak for its own sake, but in order to preserve the supremacy of federal law against inconsistent state obstacles.

Moreover, to the extent that First Amendment cases do provide guidance on the effect of funding restrictions on speech, they universally recognize that such restrictions are "substantial." *Velazquez*, 531 U.S. at 544. No one, for example, advanced the absurd proposition that Title 10's funding prohibition on "advocat[ing] abortion" did not discourage recipients from advocating abortion. *Rust*, 500 U.S. at 180. Rather, the Court found that, although the funding restriction "*necessarily* discourages" speech about abortion, *id.* at 194, this was constitutionally permissible because the government may preserve the integrity of its federal programmatic message by "refusing to fund activities, including speech" that are inconsistent with that message, *id.* at 195; *see also id.* at 194 ("When Congress established a National Endowment for Democracy to encourage other countries to adopt democratic principles . . . it was not constitutionally required to fund a program to encourage competing lines of political philosophy such as communism and fascism."); *Velazquez*, 531 U.S. at 541 ("We have said that viewpoint-based funding decisions can be sustained in . . . instances, like *Rust*, in which the government used private speakers to transmit specific information pertaining

to its own program.") (internal quotation marks omitted).

In short, the First Amendment cases confirm that funding restrictions do have the "real effect" of "discouraging" speech. That such an effect does not violate the First Amendment when needed to advance the government's interest in a uniform programmatic message in no way suggests that such an effect is consistent with the NLRA when a state acts to discourage federally-protected speech.[9]

IV. EXEMPTING REGULATORY EXERCISES OF THE STATE SPENDING POWER WOULD LEAD TO THE BALKANIZATION OF FEDERAL LABOR LAW

More generally, acceptance of the Ninth Circuit's "use" restriction distinction would severely undermine the overriding purpose of the NLRA, which federalized labor-management relations law because of "the perceived incapacity of . . . state legislatures, acting alone, to provide an informed and coherent basis for stabilizing labor relations conflict." *See Lockridge*, 403 U.S. at 286; *accord* LABOR MANAGEMENT RELATIONS at 3 ("Prior to the enactment of the [NLRA] in 1935, the law regulating

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[9] AB 1889, furthermore, is *not* designed to preserve a "programmatic message of the kind recognized in *Rust*." *Velazquez*, 531 U.S. at 548. It does not regulate any speech between the grantee and the *public* being served, but only *internal* communications with employees about union organizing efforts which do not affect the service provided. An employer's discussion with employees about unions does not dilute or divert the government-desired message in the way that, for example, a pro-drug message to clients would undermine an anti-drug program.

labor relations and union activities was a crazy quilt of state conspiracy doctrines, common law torts, and state statutes of general application applied to union activities."). Left free to pursue their own idiosyncratic labor policies through non-proprietary exercises of their spending power, states would quickly balkanize labor (and other) law in the United States.

In striking down the Wisconsin debarment law in *Gould*, this Court noted that four other states had enacted similar statutes and that "[e]ach additional statute incrementally ... detracts from the 'integrated scheme of regulation' created by Congress." 475 U.S. at 288. An even greater state encroachment exists today. There are on the books at least five other state laws that, like AB 1889, affect federal labor policy through conditions on the use of state funds.[10] In addition, laws materially identical

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[10] *See* CAL. WELF. & INST. CODE § 4638 (West 2007) (regional centers for persons with developmental disabilities "shall not use state funds allocated to the corporation for operating the center for activities directly related to influencing employees of the center regarding their decision to organize or not to organize"); ME. REV. STAT. ANN. tit. 22 § 1861 (2004) (prohibiting health care institutions from using "funds received from the State" for the purpose of engaging "persons with the intent to interfere with, inhibit or disrupt the free exercise of the right of all employees to organize"); N.Y. LAB. LAW § 704(11) (2002) (unfair labor practice for an employer "[t]o utilize any state funding appropriated for any purpose to train managers, supervisors or other administrative personnel regarding methods to discourage union organization, or to discourage an employee from participating in a union organizing drive"); N.Y. SOC. SERV. LAW § 336-f(4)(h) (2003) (employers providing job training to public assistance recipients "are prohibited from using public assistance funds to encourage or discourage (cont'd...)

to AB 1889 are being, or have recently been, considered in eight states.[11] Related state bills, which would also hinder employer speech through spending restrictions, have also been proposed in the past year.[12]

Although these state laws and bills are, like AB 1889, decidedly pro-union, the slippery slope of allowing states to further their labor policies through spending restrictions could have anti-union effects as well. A state with a different view of "neutrality" than California, for example, might enact the inverse of AB 1889, prohibiting the use of "state funds" for costs associated with the voluntary recognition of a union and allowing the use of "state funds" to engage in speech opposing unionization. Similarly, although

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(...cont'd)

membership in, or participation in the activities of, any employee organization"); OHIO REV. CODE ANN. § 5119.62 (LexisNexis 2004) (providing that "community mental health agencies shall not use state funds for the purpose of influencing employees with respect to unionization").

[11] *See* H.B. 578, 2007 Legis., Reg. Sess. (Ala. 2007); H.B. 757, 95th Gen. Assemb. (Ill. 2007); H.B. 3267, 185th Gen. Ct., Reg. Sess. (Mass. 2007); H.B. 4443, 94th Legis., 1st Reg. Sess. (Mich. 2007); H.F. 1224, 85th Legis., Reg. Sess. (Minn. 2007); S. 2701, 212th Legis. (N.J. 2007); A.B. 2222, 212th Legis. (N.J. 2006); H.B. 2892, 74th Legis. Assemb. (Ore. 2007); H.B. 492, 105th Gen. Assemb. (Tenn. 2007).

[12] *See* H.B. 5695, Gen. Assemb. (Conn. 2007); H.B. 533, 94th Gen. Assemb. (Mo. 2007); S.B. 181, 94th Gen. Assemb. (Mo. 2007); A.B. 5853, 230th Legis. Sess. (N.Y. 2007); H.B. 1502, 190th Gen. Assemb. (Pa. 2007); H.B. 1503, 190th Gen. Assemb. (Pa. 2007); H.B. 2089, 60th Legis., Reg. Sess. (Wash. 2007); S.B. 5940, 60th Legis., Reg. Sess. (Wash. 2007).

states may not bar a union engaged in a dispute with an employer from appealing to the employer's customers or suppliers to stop doing business with the employer, *see Morton*, 377 U.S. at 255, a state legislature could, under the *en banc* majority's rationale, deter state contractors from agreeing to support such secondary boycotts by precluding them from using "state funds" to pay for the replacement goods or services that would have been provided by the employer. In sum, whatever a pro-union state legislature might do on behalf of unions with such regulatory freedom, a pro-employer state legislature could do on behalf of management. Such a loophole would plainly frustrate the NLRA's purpose of striking a fair balance between labor and management that would apply uniformly around the country.

Allowing states to use their power of the purse—which is estimated to exceed $1 trillion dollars annually, *see* National Association of State Budget Officers, *The Fiscal Survey of States* 2 (June 2007), *available at* http://www.nasbo.org/publications.php (last visited Jan. 8, 2008)—in pursuit of their own labor goals would leave a gaping hole in NLRA preemption. In addition to the 50 states, there are over 3,000 counties and other localities that could, like California, impose labor-related spending restrictions on their "funds" or otherwise exercise the spending power to implement their particular labor policies. *See, e.g., Metro. Milwaukee Ass'n of Commerce v. Milwaukee County*, 431 F.3d 277, 280 (7th Cir. 2005) (holding preempted Milwaukee County ordinance requiring county contractors to enter into "labor peace agreements"). The difficulties of tracking and complying with such laws is hard to

overstate, particularly if the laws conflict with one another. Employers would be required to trace each dollar received and comply with the particular governmental regulation applicable to that dollar. Given the opaque and ill-defined administrative requirements found in AB 1889 alone, this would result in an accounting nightmare, with each state, county, and municipality free to impose its own unique accounting, reporting, and segregation requirements. The burden on national and international businesses of following myriad different and conflicting labor standards, depending on the predilections of state and local jurisdictions, is precisely what Congress intended to avoid in federalizing labor-management relations law. *See Nash-Finch*, 404 U.S. at 144. Indeed, if regulatory exercises of the state spending power are immune from ordinary preemption principles, the damage to the uniformity of federal law would not be limited to the labor context. Through reticulated regulatory regimes governing the use of "state funds," states could manipulate the conduct of virtually any entity with which they have some financial interaction, heedless of the dictates of federal law.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

ROBIN S. CONRAD
SHANE BRENNAN
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337
Of Counsel

STEVEN J. LAW
STEPHEN A. BOKAT
OFFICE OF CHIEF LEGAL
OFFICER AND GENERAL
COUNSEL, U.S. CHAMBER
OF COMMERCE
1615 H STREET, NW
WASHINGTON, DC 20062
(202) 463-5576
Of Counsel

BRADLEY W. KAMPAS
SCOTT OBORNE
JACKSON LEWIS LLP
199 Fremont Street
10th Floor
San Francisco, CA 94105
(415) 394-9400
Of Counsel

WILLIS J. GOLDSMITH
(Counsel of Record)
JONES DAY
222 East 41st Street
New York, NY 10017
(212) 326-3649

MICHAEL A. CARVIN
NOEL J. FRANCISCO
LUKE A. SOBOTA
JONES DAY
51 Louisiana Avenue,
N.W.
Washington, D.C. 20001
(202) 879-3939
Counsel for Petitioners

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CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, *et al.*,
Petitioners,

v.

EDMUND G. BROWN, JR., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND CALIFORNIA LABOR FEDERATION

JONATHAN P. HIATT
815 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 637-5053

STEPHEN P. BERZON
SCOTT A. KRONLAND *
STACEY M. LEYTON
ALTSHULER BERZON LLP
177 Post Street, Suite 300
San Francisco, CA 94108
(415) 421-7151

Counsel for Respondents American Federation of Labor and Congress of Industrial Organizations and California Labor Federation

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Whether California Government Code Sections 16645.2 and 16645.7, which prohibit employers from using state grant and program funds to assist or deter union organizing but do not restrict the use of other funds, are preempted by the National Labor Relations Act.

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IN THE

Supreme Court of the United States

No. 06-939

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, *et al.*,
Petitioners,

v.

EDMUND G. BROWN, JR., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND CALIFORNIA LABOR FEDERATION

STATEMENT OF THE CASE

1. Restrictions on the Use of Federal Money

This case involves a California law modeled on federal statutes. By those statutes, Congress prohibits recipients of certain federal grant and program funds from using that *federal* money "to assist, promote, or deter union organizing."

The National and Community Service Act states that "[a]ssistance provided under this subchapter

shall not be used by program participants and program staff to . . . assist, promote, or deter union organizing." 42 U.S.C. §12634(b)(1); *see also* 45 C.F.R. §2540.100(c) ("What restrictions govern the use of Corporation assistance? . . . Corporation assistance may not be used by program participants or staff to assist, promote, or deter union organizing . . . ."); 45 C.F.R. §2520.65(a) ("While charging time to the AmeriCorps program . . . staff and members may not engage in the following activities: . . . Assisting, promoting, or deterring union organizing.").

The federal Workforce Investment Act requires "[e]ach recipient of funds . . . [to] provide to the Secretary assurances that none of such funds will be used to assist, promote, or deter union organizing." 29 U.S.C. §2931(b)(7); *see also* 20 C.F.R. §663.730 ("May funds provided to employers for OJT or customized training be used to assist, promote, or deter union organizing? . . . No, funds provided to employers for OJT or customized training must not be used to directly or indirectly assist, promote or deter union organizing.").

The federal Head Start Programs Act contains a provision entitled "[n]eutrality concerning union organizing" that provides that "[f]unds appropriated to carry out this subchapter shall not be used to assist, promote, or deter union organizing." 42 U.S.C. §9839(e). *See also* U.S. Dept. of Health and Human Services, Administration on Children, Youth and Families, Information Memorandum No. ACYF-IM-HS-00-11 (Mar. 27, 2000) ("Federal Head Start grant funds must not be used to 'assist, promote or deter union organizing.' This restriction only applies to the use of Federal Head Start funds. If a grantee uses non-Head Start funds and resources for these pur-

poses, such expenditures must be carefully documented and costs must be allocated in such a way as to ensure that there is no misuse of Federal funds.").

The federal Medicare Act contains a related provision that precludes employers from including the costs of lobbying their employees about unionization on the cost reports they submit to the government. *See* 42 U.S.C. §1395x(v)(1)(N) ("In determining such reasonable costs, costs incurred for activities directly related to influencing employees respecting unionization may not be included.").

2. California Assembly Bill 1889

In 2000, California adopted Assembly Bill No. 1889 ("AB 1889"), codified at California Government Code Sections 16645-49, which includes restrictions on the use of *state* grant and program funds to "assist, promote or deter union organizing" that parallel the federal restrictions discussed above. The statutory preamble declares:

> It is the policy of the state not to interfere with an employee's choice about whether to join or to be represented by a labor union. For this reason, *the state should not subsidize* efforts by an employer to assist, promote, or deter union organizing. It is the intent of the Legislature in enacting this act to prohibit an employer from using *state funds* . . . for the purpose of influencing employees to support or oppose unionization . . . .

Cal. Stats. 2000, ch. 872, §1 (emphases added).

Two separate restrictions contained in AB 1889 are at issue in this case: The restrictions applicable to state grant money (§16645.2) and to state program

funds (§16645.7). With respect to state grant money, Section 16645.2 provides that

> [t]he recipient of a grant of state funds, including state funds disbursed as a grant by a public agency, shall not use the funds to assist, promote, or deter union organizing.

Cal. Gov. Code §16645.2(a). As for state program funds, Section 16645.7 provides that

> [a] private employer receiving state funds in excess of ten thousand dollars ($10,000) in any calendar year on account of its participation in a state program shall not use any of those funds to assist, promote, or deter union organizing.

Cal. Gov. Code §16645.7(a).

AB 1889 defines "state funds" as "money drawn from the State Treasury or any special or trust fund of the state." Cal. Gov. Code §16645(d)(1). The phrase "assist, promote, or deter union organizing" is defined to include "any attempt by an employer to influence the decision of its employees in this state or those of its subcontractors regarding . . . [w]hether to support or oppose a labor organization that represents or seeks to represent those employees. . . . [or w]hether to become a member of any labor organization." Cal. Gov. Code §16645( )(1), (2).

The statute clarifies that its restrictions do not apply to labor relations expenditures that do not involve an employer lobbying its employees about whether to form or join a union: "(a) Addressing a grievance or negotiating or administering a collective bargaining agreement; (b) Allowing a labor organization or its representatives access to the employer's facilities or property; (c) Performing an activity

required by federal or state law or by a collective bargaining agreement; [or] (d) Negotiating, entering into, or carrying out a voluntary recognition agreement with a labor organization." Cal. Gov. Code §16647.

Recipients of state grant and program funds must "maintain records sufficient to show that state funds have not been used for . . . expenditures" to assist, promote or deter union organizing, and they must "provide those records to the Attorney General upon request." Cal. Gov. Code. §16645.2(c), §16645.7(c). But the statute expressly provides that "[n]othing in [AB 1889] requires employers to maintain records in any particular form." Cal. Gov. Code §16648.

Recipients that spend state funds in violation of these spending restrictions are "liable to the state for the amount of any funds expended in violation of [the restriction] plus a civil penalty equal to twice the amount of those funds." Cal. Gov. Code §16645.2(d), §16645.7(d). Civil actions to enforce AB 1889 may be brought by the California Attorney General and by private taxpayers; all misspent funds and penalties recovered in such an action are paid to the state treasury. Cal. Gov. Code §16645.8.

3. District Court Proceedings

In 2002, a group of employer associations and employers (hereinafter "Petitioners"), filed suit in the Central District of California to challenge numerous provisions of AB 1889. J.A. 49, 94. They alleged, among other things, that AB 1889 is preempted by the National Labor Relations Act ("NLRA"), 29 U.S.C. §§151-69. J.A. 124-25. The lawsuit named the California Attorney General and other state officials as defendants. J.A. 94-95, 117-18. The

American Federation of Labor and Congress of Industrial Organizations and the California Labor Federation intervened as additional defendants. J.A. 9, 63. The defendants in the District Court are referred to hereinafter as "Respondents."

Petitioners moved for summary judgment shortly after filing their lawsuit. J.A. 55. They claimed that compliance with AB 1889 would be burdensome. J.A. 129, 135-36, 155, 158-59, 160-61, 163, 165-68. In opposition, Respondents submitted an expert declaration from a partner in a national accounting firm stating that the "accounting and recordkeeping requirements imposed by AB 1889 with regard to state funds are similar to requirements imposed in other contexts, particularly for federal grant recipients" and that complying with AB 1889 would be "significantly less burdensome" than complying with standard federal grant restrictions. J.A. 280-83.

The District Court granted partial summary judgment to Petitioners, concluding that Government Code Sections 16645.2 and 16645.7 are preempted by the NLRA because they "regulate[] employer speech about union organizing under specified circumstances, even though Congress intended free debate." Pet. 147a. The District Court concluded that Petitioners had not demonstrated standing to challenge any other AB 1889 provisions. Pet. 142a-144a. The District Court did not find that any facts about the compliance burdens imposed by AB 1889 were undisputed or resolve any issues about the interpretation of the new state law. *See* Pet. 140a-149a.[1]

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[1] Respondents had asked the District Court to abstain from hearing the case, pursuant to *Railroad Comm'n of Texas v. Pullman*, 312 U.S. 496 (1941), to allow the state courts to

The District Court then entered a partial final judgment pursuant to Federal Rule of Civil Procedure 54(b) declaring California Government Code Sections 16645.2 and 16645.7 preempted by the NLRA and enjoining the State from enforcing those provisions. J.A. 85-86, 348-50. The District Court stayed the remainder of the case pending an appeal to the Ninth Circuit. J.A. 352-53.

4. Ninth Circuit Proceedings

On appeal, a Ninth Circuit panel initially issued a decision affirming the District Court's grant of summary judgment. Pet. 115a-139a. The panel then granted rehearing, withdrew its original decision, and issued a new decision that reached the same conclusion, this time over a dissent. Pet. 58a-113a, 157a-158a. The full Ninth Circuit decided to hear the case en banc. Pet. 156a. After hearing oral argument, the en banc panel voted 12-3 to reverse the District Court's grant of summary judgment and remand for further proceedings. Pet. 1a-57a.

A. The 12 judges in the en banc majority recognized that the case was before the Ninth Circuit on "a facial challenge" (Pet. 7a), and that "the California statute does not prevent an employer from using non-state funds to assist, promote, or deter union organizing." Pet. 18a. The majority also disagreed with the dissenters' interpretation of Sections 16645.2 and 16645.7 as restricting the use of funds that employers already have earned:

> The dissent's parade of horribles goes far beyond the scope of plaintiffs' facial challenge to sections

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interpret the new law. The District Court denied the request. Pet. 145a-146a. There are no state court decisions interpreting AB 1889.

> 16645.2 and 16645.7 and the record before us. The district court made no findings, nor is there evidence, that AB 1889 "co-opts the payment for goods and services realized under a contract." . . . . [T]he California statute, like various federal acts, requires only that those who accept government grant and program funds use them for the purpose for which they were given. Our construction of AB 1889 is readily apparent.

Pet. 34a (citations, internal quotation marks, and footnote omitted).

In this regard, the majority pointed out that the section of AB 1889 that addresses state contracts (§16645.4) was not before the Ninth Circuit on appeal, and that the California Attorney General had agreed Sections 16645.2 and 16645.7 would not restrict the use of *profits* employers earn from state grants and programs. Pet. App. 32a-33a n. 20 & 34a n. 22.

The 12 judges in the majority also rejected, as unsupported by the record, the dissenters' conclusion that Sections 16645.2 and 16645.7 impose onerous compliance burdens:

> Despite the absence of any finding by the district court that §16645.2(c) and §16645.7(c) are onerous, the dissent insists that these provisions entail "burdensome and detailed record-keeping," impose "seemingly impossible compliance burdens" and are "daunting." The dissent even suggests that these provisions require "an employer [to] create and maintain two completely separate accounting and payroll systems." The statute, however, does not require "employers to maintain records in any particular form,"

> §16648, and leaves employers free to design their own accounting and payroll systems however they wish, provide only that they have "records sufficient to show that state funds have not been used" to assist, promote or deter union organizing, §16645.2(c), 16645.7(c). Moreover, the only expert testimony in the record on these provisions states that they provide employers "flexibility in establishing proper accounting procedures and controls," impose no burden greater than numerous other common grant restrictions and in fact "appear to be significantly less burdensome than the detailed requirements for federal grant recipients. . . ."

Pet. 4a-5a n.2 (brackets in original).

Based on the posture of the case and the record before the Ninth Circuit, the en banc majority held that the District Court had erred in striking down Sections 16645.2 and 16645.7 on NLRA-preemption grounds.

The majority rejected the claim that the NLRA contains an "affirmative grant of speech rights" to employers. Pet. 24a. The majority pointed out that NLRA Section 8(c) "merely states an employer does not commit an unfair labor practice by expressing its views regarding unionization." Pet. 23a (citation, internal quotation marks omitted).

The majority further concluded that the state provisions do not regulate activities that Congress intended to be unregulated, and therefore do not fall within the class of laws preempted by the NLRA under the doctrine known as *Machinists* preemption. The majority reasoned that "it is implausible that Congress intended the use of [government] funds to

be an area 'unregulated because left to be controlled by the free play of economic forces.'" Pet. 16a-17a (quoting *Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 140 (1976)). The majority observed that "the spending restrictions . . . are modeled precisely on those that Congress has enacted when prohibiting the use of federal funds to assist, promote or deter union organizing." Pet. 17a, 20a.

The majority also concluded that Sections 16645.2 and 16645.7 do not impermissibly intrude on the jurisdiction of the National Labor Relations Board ("Board") so they are not preempted under the doctrine known as *Garmon* preemption, which flows from this Court's decision in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959). Pet. 22a-30a. The majority reasoned that California had not sought to duplicate the role of the Board by regulating which activities are permissible during union organizing campaigns, but only how the State's own money may be spent. Moreover, because California declines to subsidize *all* employer lobbying about unionization regardless of whether the lobbying activities are permissible or impermissible under the NLRA, state enforcement proceedings would not involve the same issues that would be before the Board in unfair labor practice or representation proceedings. Pet. 25a-29a.

The en banc majority also reasoned that, "even if there were some risk of overlap," the AB 1889 provisions at issue involve "'interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we [cannot] infer that Congress ha[s] deprived the States of the power to act.'" Pet. 30a (quoting *Garmon*, 359 U.S. at

243-44). The majority stated: "[T]he state . . . has a responsibility and a right to spend its treasure . . . based on principles and guidelines that its democratically elected legislature deems to be appropriate. . . . [T]he Supreme Court has commanded us to be extremely cautious before concluding that a federal regulatory scheme intrudes upon so fundamental a state prerogative." Pet. 31a.

Finally, the en banc majority rejected the dissenters' conclusion that Sections 16645.2 and 16645.7 are invalid on their face because they violate employers' First Amendment rights. The majority relied on this Court's decisions holding that "'a legislature's decision not to subsidize the exercise of a . . . right does not infringe the right.'" Pet. 33a (quoting *Regan v. Taxation with Representation*, 461 U.S. 540, 546 (1983)).

B. The three dissenting judges (Judge Beezer, joined by Judges Kleinfeld and Callahan) would have held that Sections 16645.2 and 16645.7 violate the First Amendment (Pet. 37a-40a) and are preempted by the NLRA (*id.* 40a-57a).

Unlike the majority, the dissenters interpreted Sections 16645.2 and 16645.7 as restricting how businesses spend the profits they earn from dealing with the state. Pet. 36a, 38a-40a. And, unlike the majority (and despite the specific record evidence to the contrary in this summary judgment case), the dissenters believed that Sections 16645.2 and 16645.7 impose "significant compliance burdens." Pet. 45a-47a. Thus, unlike the majority, the dissenters treated the state provisions as "impel[ling] employers themselves to take a position of neutrality with respect to labor relations, in direct conflict

with employers' rights under the First Amendment." Pet. 37a.

SUMMARY OF ARGUMENT

California's AB 1889 leaves employers that receive state grant and program funds free to lobby their employees about whether to unionize. Like several similar federal statutes, AB 1889 merely precludes employers from using government funds to pay for the costs of that activity.

That being so, AB 1889 reflects California's legitimate interest in government neutrality—not impermissible hostility to the NLRA or to employer speech. This Court's precedents establish a fundamental distinction between the government prohibiting or penalizing private activity and the government declining to *subsidize* that activity. Political lobbying, for example, is at the core of the First Amendment, but the government need not subsidize lobbying in the tax code. *See Regan v. Taxation With Representation*, 461 U.S. 540, 545-46 (1983). Likewise, the Court had "little trouble in concluding" that the government's denial of food stamps to the families of striking workers was "rationally related to the legitimate governmental objective of avoiding undue favoritism to one side or the other in private labor disputes." *Lyng v. UAW*, 485 U.S. 360, 371-72 (1988). AB 1889 serves a similar "legitimate governmental objective."

Petitioners claim the term "state funds" in AB 1889 is so broad it could cover even the profits they earn from dealing with the government. But the California Legislature declared that the purpose of AB 1889 is to avoid state subsidization of efforts to assist or deter union organizing. The state courts would

interpret AB 1889 in light of that purpose, the similar federal statutes on which AB 1889 is modeled, and the dictates of the First Amendment, so that it applies only to funds in which the State has an interest, not to an employer's own money.

Congress would not have intended the NLRA to preempt AB 1889. Congress' adoption of restrictions on the use of *federal* grant and program funds to "assist, promote, or deter union organizing" shows that the existence of such restrictions is not inconsistent with national labor policy.

As an initial matter, Petitioners are wrong that the NLRA is a source of employer speech rights that AB 1889 could infringe. The NLRA provides statutory rights to "employees"—not their employers. NLRA Section 8(c), by its plain language, simply accommodates the First Amendment by stating that noncoercive employer speech is not "evidence of an unfair labor practice." And, even if NLRA Section 8(c) were viewed as importing the First Amendment into the NLRA, the First Amendment still does not require the government to *subsidize* expressive activities.

AB 1889 also does not fall within the class of laws that are preempted by the NLRA because they regulate in areas Congress intended to be free from all regulation. California, like the federal government, must have rules about how its grant and program funds may be spent.

Nor does AB 1889 fall within the class of laws that are preempted because they interfere with the jurisdiction of the NLRB. The issue in a proceeding to enforce AB 1889 would be whether government funds have been mis-spent, not whether particular employer activities are permissible. There is no overlap with the NLRB's jurisdiction.

This case is not analogous to *Wisconsin Department of Industry v. Gould*, 475 U.S. 282 (1986), in which a state legislature sought to debar employers that committed NLRA violations from doing business with the State. The purpose of the law in *Gould* was *punishment* and punishment for violating federal labor law. Here California is not punishing employers; the "refusal to subsidize certain protected conduct . . . . cannot be equated with the imposition of a 'penalty' on that activity." *Harris v. McRae*, 448 U.S. 297, 317 n.19 (1980). AB 1889 also applies without regard to whether particular employer lobbying activity violates the NLRA.

Even if NLRA preemption doctrines otherwise were implicated, moreover, the Court has recognized that these judicially created doctrines cannot be applied inflexibly to state regulation that addresses deeply rooted local interests. Forcing California to subsidize private ideological activities from its treasury would be a serious intrusion on core state sovereignty.

Although Petitioners' central contention is that California has an obligation to subsidize their lobbying campaigns about unionization, they also argue that AB 1889 is preempted because the statute allegedly imposes onerous compliance burdens that would chill employers from using their own money for that purpose. The record evidence and this Court's precedents refute that argument.

AB 1889 merely requires recipients of state grant or program funds to maintain "records sufficient to show" that "state funds" were not used to assist or deter union organizing, and the statute provides expressly that those records need not be kept "in any particular form." The record evidence includes expert testimony that compliance with AB 1889 would *not*

be burdensome, and on an appeal from a grant of summary judgment the disputed facts must be resolved against Petitioners. This Court also has rejected claims that much more burdensome requirements for protecting against the misuse of government subsidies impermissibly chill the free speech rights of the recipients of those subsidies.

ARGUMENT

I. AB 1889 FURTHERS A LEGITIMATE STATE INTEREST IN AVOIDING GOVERNMENT SUBSIDIES OF PRIVATE LOBBYING ACTIVITY.

A. The Government's Decision Not to Subsidize Activities Does Not Reflect Impermissible Hostility to Those Activities.

Petitioners erroneously urge that California's declared motive for adopting AB 1889 renders the statute preempted on its face. According to Petitioners, California, unlike the NLRA, views all employer efforts to lobby employees about union organizing as interference with employee rights. *E.g.*, Pet. Br. 14, 30, 38, 41-42. But what the full preamble to AB 1889 declares is that "[i]t is the policy *of the state* not to interfere with an employee's choice about whether to join or to be represented by a labor union" and "[f]or this reason, *the state should not subsidize* efforts by an employer to assist, promote or deter union organizing." Cal. Stats. 2000, ch. 872, §1 (emphases added). Moreover, the two provisions of AB 1889 at issue here do not preclude employers from lobbying their employees about unionization. They merely preclude employers from

using *state* grant and program funds to pay the costs of that activity.

This Court's decisions establish a fundamental distinction between the government prohibiting or penalizing private activity and the government merely declining to subsidize that activity. A prohibition on political lobbying would violate core First Amendment rights, but the government can refuse to subsidize lobbying activity in the tax code. *Regan v. Taxation With Representation*, 461 U.S. 540, 549 (1983) ("We have held in several contexts that a legislature's decision not to subsidize the exercise of a . . . right does not infringe the right. . . ."); *Cammarano v. United States*, 358 U.S. 498, 512-13 (1959). The existence of a constitutional right to obtain an abortion does not mean the government must pay for indigent women to obtain abortions, even if the government otherwise pays for their medical care. *Harris v. McRae*, 448 U.S. 297 (1980); *Maher v. Roe*, 432 U.S. 464 (1977). The government cannot infringe the associational rights of striking workers, but it can deny food stamps to families that become eligible because a worker is on strike. *Lyng v. UAW*, 485 U.S. 360, 368-69 (1988) ("[T]he strikers' right of association does not require the Government to furnish funds to maximize the exercise of that right."). In short, a state's decision not to subsidize an activity—like California Government Code Sections 16645.2 and 16645.7—"cannot be equated with the imposition of a 'penalty' on that activity." *Harris v. McRae*, 448 U.S. at 317 n.19.

Petitioners *selectively* quote from the preamble to AB 1889 (*e.g.*, Pet. Br. 30), and then build their entire argument on the misrepresentation that the purpose of the law is to preclude employers from lobbying

their employees about unionization. California's policy is government neutrality—not employer neutrality. *See* Cal. Stats. 2000, ch. 872, §1 ("It is the policy *of the state* not to interfere with an employee's choice about whether to join or to be represented by a labor union. For this reason, *the state should not subsidize* efforts by an employer to assist, promote, or deter union organizing.") (Emphases added). The view that the government would be interfering with free debate by subsidizing the costs of private lobbying or proselytizing activity is neither unusual nor illegitimate.

Congress restricts political lobbying by non-profit organizations that receive tax-deductible contributions not because our elected representatives are hostile to political activity but because Congress does not believe taxpayers should subsidize that activity. *See Regan*, 461 U.S. at 544 ("In short, Congress chose not to subsidize lobbying as extensively as it chose to subsidize other activities that non-profit organizations undertake to promote the public welfare."). To the same end, a federal statute known as the Byrd Amendment provides broadly that "[n]one of the funds appropriated *by any Act* may be expended by the recipient of a Federal contract, grant, loan, or cooperative agreement" to pay for certain lobbying activities. 31 U.S.C. §1352 (emphasis added); *see also* J.A. 288 (OMB requirement that all federal contractors and subcontractors must certify compliance with Byrd Amendment restrictions). Federal regulations also broadly disallow non-profit organizations that have grants, contracts or other agreements with any government agency from allocating the costs of political lobbying to their government grants or contracts, so that taxpayers do not wind up subsidizing this activity. *See* 70 Fed. Reg. 51927, 51938-39

(Aug. 31, 2005) (OMB Circular No. A-122: Cost Principles for Non-Profit Organizations); J.A. 290, 296-97.

Similarly, provisions in the federal Workforce Investment Act, National and Community Services Act, Head Start Programs Act, and Medicare Act that prevent federal money from being used to subsidize employer efforts to lobby their employees about unionization (*see* pp. 1-3, *supra*), are based on a government interest in neutrality—not employer neutrality but *government* neutrality. The AB 1889 provisions at issue are modeled on those federal laws.

Contrary to Petitioners' contention, it is not true that the government's *only* legitimate interest in avoiding subsidization of private speech occurs when the government seeks to advance a contrary viewpoint, as in *Rust v. Sullivan*, 500 U.S. 173 (1991), in which the government sought to promote childbirth over abortion. There also is a separate, legitimate government interest in government neutrality and non-entanglement when it comes to private political and ideological activities. That interest in neutrality was the basis of the law upheld in *Regan*, which did not involve any government "message."

In *Lyng*, this Court referred with approval to the government's "concern about neutrality in labor disputes" and stated that it had "little trouble in concluding that" the government's denial of food stamps to the families of striking workers was "rationally related to the legitimate governmental objective of avoiding undue favoritism to one side or the other in private labor disputes." 485 U.S.

at 371-72.[2] AB 1889 furthers a similar "legitimate governmental objective."

B. The Government May Impose Specific Rules About How Its Grant and Program Funds May Be Spent.

Petitioners are wrong that California's interest in not subsidizing efforts to assist or deter union organizing already is completely satisfied "by the standard requirement, in California and elsewhere, that public funds may go only toward grant-related purposes and expenses." Pet. Br. 35. That standard requirement leaves open the question whether, when the recipient of government subsidies is an employer, the employer's efforts to assist or deter union organizing by its employees—which can be very costly—are overhead expenses that can be paid for out of the government money.

The need to answer the question whether specific business expenses can be charged to the government as overhead under a government grant or in a government program explains why the federal government has pages of detailed rules on the subject, which cover such minutiae as whether government funds can used to pay for a glass of wine with dinner. *See* 2 C.F.R. Part 230, Appendix B; *see also* Office of

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[2] Indeed, in *Lyng*, this Court accepted as legitimate Congress' concern about the mere public *perception* that government funds were being used "to provide one-sided support for labor strikes," stating that the food-stamps-eligibility restriction "was intended to remove the basis for that perception and criticism." *Id.* at 371. The Court recognized Congress' finding that this perception "has damaged the program's public integrity" (*id.*) and concluded that "we are not authorized to ignore Congress' considered efforts to avoid favoritism in labor disputes." *Id.* at 372.

Management and Budget, Codification of Governmentwide Grant Requirements, www.whitehouse.gov/omb/grants/chart.html (last visited Feb. 3, 2008) (citations to the many provisions of the Code of Federal Regulations that contain rules about the permissible uses of government grant and contract funds).

Contrary to Petitioners' contention, the government cannot control the use of its funds solely by declining to reimburse private parties for certain costs already incurred (*see, e.g.*, Cal. Gov. Code §16645.1 (addressing cost reimbursements)), because there are a variety of circumstances in which the government provides subsidies that are not structured as reimbursements for specific costs already incurred by the recipient. The government may provide money in advance to subsidize the costs of job training, or medical research, or early-childhood education, or delivering legal services. Like the two state provisions here at issue, the federal use-of-funds restrictions on which California Government Code Sections 16645.2. and 16645.7 are modeled (*see* pp. 1-3, *supra*), do not merely address which expenses are "allowable" for later cost-reimbursement purposes. Nor are these federal provisions limited to grants. *See, e.g.*, 42 U.S.C. §12634(b)(1) (restricting use of funds "by program participants").

Petitioners also are wrong in contending that California could avoid subsidizing employers' efforts to lobby employees about union organizing by "generically and neutrally exclud[ing] costs relating to employee relations from programs and grants." Pet. Br. 35. That contention makes no sense at all, because normal "employee relations" costs are necessary overhead costs for recipients of grant and

program funds that have employees. They must run their operations, including by maintaining human resources departments, hiring and firing employees, and engaging in collective bargaining if their employees are unionized. This is reflected in standard *federal* rules for grants and contracts with nonprofit organizations, which allow employers to use government money to pay an appropriate share of the employer's "[c]osts incurred in maintaining satisfactory relations between the organization and its employees" (70 Fed. Reg. at 51938) and of its "[e]mployee morale, health, and welfare costs" (*id.* at 51936). By contrast, lobbying employees about whether to unionize, like political lobbying or religious proselytizing, is a purely optional, ideological activity.

Thus, that the California statute does not bar the use of state grant and program funds to pay the costs of *all* labor relations expenses is *not* inconsistent with the statutory purpose, which is avoiding state subsidies of employer campaigns to assist or deter union organizing, because the State does not wish to subsidize this optional, private lobbying activity.

Petitioners complain that California Government Code Section 16647 provides explicit clarification that the costs of certain labor relations activities are not covered by AB 1889, but none of those activities involve lobbying employees about unionization, so they would not be covered in any event.

"Addressing a grievance [and] negotiating [and] administering a collective bargaining agreement" (§16647(a)) are necessary activities for employers that already have union-represented employees. They do not involve lobbying employees about whether to unionize in the first place. Similarly,

"[a]llowing a labor organization or its representatives access to the employer's facilities or property" (§16647(b)) may be required by law or by a collective bargaining agreement or may otherwise be an ordinary expense in a unionized workforce.[3] Nothing in AB 1889 *requires* employers to allow such access to pro-union or anti-union advocates. And, if the employer goes beyond merely providing access and instead pays its employees to attend mandatory meetings to hear pro-union or anti-union speeches, that expenditure *would* be covered by AB 1889's restrictions on the use of state grant and program funds for persuader activities.

Nor does "[n]egotiating, entering into, or carrying out a voluntary recognition agreement with a labor organization" (§16647(d)) involve any lobbying activity. Under the NLRA, employers are free to decide whether to recognize a union voluntarily under procedures agreed upon with the union, such as on the basis of a card check, or to await the outcome of an election conducted by the National Labor Relations Board. *See* NLRA §9(c)(1)(A), 29 U.S.C. §159(c)(1)(A) (representation election only necessary when the "employer declines to recognize" the union); *ILGWU v. NLRB,* 366 U.S. 731, 739-40 (1961) (employer can recognize union without an election if authorization cards show union represents majority of workforce). Which path to choose is the employer's

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[3] *See, e.g., Sam Andrews' Sons v. Agricultural Labor Relations Bd.*, 47 Cal.3d 157, 173-81, 763 P.2d 881, 892-97 (1988) (agricultural employers required by California law to provide unions reasonable access to employees on company property); *Eby-Brown Co.*, 328 NLRB 496, 548 (1999) (access of employees' union representative to company premises is a mandatory subject of collective bargaining under the NLRA).

option; neither choice involves lobbying employees about whether to unionize; and AB 1889 treats the costs of both activities identically. If the employer lobbies its employees to sign authorization cards, by contrast, that persuader activity would be covered by AB 1889.[4]

The sum of the matter is that California, like the federal government, must have rules about how its grant money and program funds may be spent by recipients, including rules about whether government money can be used to pay the costs of lobbying employees about whether to support unions. There is no limiting principle to Petitioners' argument to the contrary. By Petitioners' logic, if a state permitted its grant or program funds to be used for ordinary and

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[4] To the extent Petitioners are complaining that AB 1889 does not apply to unions (except in their role as employers), that complaint is of no moment because Petitioners made no showing that unions receive state grant or program funds that they are using (or could use) to promote unionization. In *Lyng*, the statute permissibly prohibited only families of striking workers from receiving food stamps because there was no indication that *employers'* families were becoming eligible for food stamps because of strikes or lock outs. Congress did not discriminate by not expressly excluding them.

Moreover it is not true that employers invariably oppose unionization. Some employers incur costs to "assist" or "promote" union organizing, particularly where the rest of the employer's workforce already is unionized or the employer has a preference between competing labor organizations. *See, e.g.*, *Davis Supermarkets, Inc. v. NLRB*, 2 F.3d 1162, 1176 (D.C. Cir. 1993), *cert. denied*, 511 U.S. 1003 (1994); *Schlabach Coal Co. v. NLRB*, 611 F.2d 1161, 1161 (6th Cir. 1979); *District 65, Distributive Workers of America v. NLRB*, 593 F.2d 1155, 1159 (D.C. Cir. 1978); *Rochester Mfg. Co.*, 323 NLRB 260, 261-64 (1997), *aff'd sub nom.*, *Cecil v. NLRB*, 194 F.3d 1311 (6th Cir. 1999) (table), *cert. denied*, 529 U.S. 1066 (2000).

necessary employee relations expenses, employers could use unlimited amounts of that government money to assist or deter union organizing.

C. The State Statute Applies to Funds in Which the State has an Interest.

Petitioners and their *amici* fight a strawman in arguing that California seeks to control the use of funds private employers already have "earned." The 12-judge majority on the Ninth Circuit already rejected that interpretation of Sections 16645.2 and 16645.7. Pet. 1a-2a, 32a-33a n. 20, 34a & n.22. There is no reason to believe the state courts will construe the statute differently: The AB 1889 provisions at issue are addressed solely to the use of "state funds;" the California Legislature's declared purpose in adopting the law was to avoid having the state "*subsidize*" the costs of assisting or deterring union organizing; and the state law was modeled on existing federal legislation. The California courts also construe statutes to avoid potential constitutional problems. *See Dyna-Med, Inc. v. Fair Empl. & Housing Comm'n*, 43 Cal.3d 1379, 1387, 743 P.2d 1323, 1327 (1987); *San Francisco Unified School Dist. v. Johnson*, 3 Cal.3d 937, 948, 479 P.2d 669, 675 (1971).

The record does not contain details about the specific state grants awarded to Petitioners and their members, but Petitioners do not dispute that there is a "standard requirement, in California and elsewhere, that public funds may go only toward grant-related purposes and expenses." Pet. Br. 35. Section 16645.2, in providing that the "[t]he recipient of a grant of state funds . . . shall not use *the funds* to assist, promote, or deter union organizing" (emphasis

added), simply makes clear that lobbying employees about unionization is not one of the "grant-related purposes and expenses" for which the State's grant money may be used. We are not aware of grants made by the State of California that permit the recipient to earn a profit from the grant money, but the Attorney General acknowledged in the lower courts that AB 1889's restriction would not apply to such profits. Pet. 32a-33a n. 20.

Similarly, the record does not contain details about how the restriction in Section 16645.7 applies to particular "state program[s]," but it is unlikely the term "state program" is intended to refer to the one-time purchase of widgets on the open market. (A separate provision of AB 1889, not at issue in this appeal, addresses state "contracts." *See* Cal. Gov. Code §16645.4). Rather, a state "program" would involve ongoing efforts by the state government to subsidize the costs of providing services (*e.g.*, health care, job training, education) to a segment of the population.

Some Petitioners (and/or their members), for example, receive funds from a state program set up by California to subsidize the costs of employee job skills training, which is administered by a state agency, the Employment Training Panel. D.Ct. Doc. No. 11 (Kronland Decl. Opp. Pl. Mot. Summ. J.), Ex. 4 (Dahlman Depo.) at 41:17-42:11; *id.*, Ex. 9 (Rothrock Depo.), at 19:11-19; D.Ct. Doc. No. 40 (Stewart Decl. Supp. Pl. Mot. Summ. J.) ¶3; Cal. Unempl. Ins. Code §§10200-10217 (statutes establishing the program); 22 Cal. Code Regs. §§4400-4450 (implementing regulations). This program, which supplements programs funded by the federal Workforce Investment Act, has "provided over $1 billion to train more than

660,000 workers in over 60,000 California companies." Cal. Employment Training Panel, Program Overview, available at www.etp.cahwnet.gov/program.cfm (last visited Feb. 4, 2008). The purpose of this state program is to provide skills training to California workers "to promote a healthy labor market in a growing, competitive economy." Cal. Unempl. Ins. Code §10200.

This program does not contemplate that employer participants will earn a *profit* from the State's training subsidies; to the contrary, the Employment Training Panel is required to "establish requirements for in-kind contributions by either the contractor or the employer that reflect a substantial commitment on the part of the contractor or the employer to the value of the training." Cal. Unempl. Ins. Code §10206(b). Just as this Court acknowledged Congress' concern in *Lyng* that the perception the food stamp program was being used to subsidize striking workers "ha[d] damaged the program's public integrity" (485 U.S. at 371), so would public support for this worthy state training program be undermined if employers could use state training money to subsidize the substantial costs of assisting or deterring union organizing. Congress reached the same conclusion in adding a restriction on the use of funds under the similar federal Workforce Investment Act. *See* 29 U.S.C. §2931(b)(7).

Some of the Petitioners (and/or their members) also receive money from California's Medi-Cal program, which is intended to pay for health care for the indigent. *See, e.g.*, J.A.130, 156, 161, 166. The Medi-Cal funding scheme is complicated and functions differently for different types of heath care providers. For example, California makes interim payments to

some hospitals to help them meet cash flow during the fiscal year, then reaches a final settlement with them after the fiscal year has concluded. *See* 22 Cal. Code Regs. §51536 *et seq.*; *Redding Medical Center v. Bonta*, 75 Cal.App.4th 478, 480, 89 Cal.Rptr.2d 348, 349 (1999).[5] In light of the declared anti-subsidization purpose of AB 1889, the term "state funds" in Section 16645.7 would cover Medi-Cal funds in which the State retains an interest (such as the interim payments) but not profits once they have been "earned" by the recipient. *See* Pet. 32a-33a n.20 (noting the Attorney General's agreement that even a company "that receives 100% of its revenues from the state" could pay out a legitimate dividend, which would not constitute "state funds."). As *amicus curiae* American Hospital Association acknowledges, however, "the state reimburses hospitals less than their costs for providing care to Medi-Cal patients" (Amer. Hosp. Assn. Br. 4, 15, 17), so there may not be any profits from the Medi-Cal program.

In predicting how the state courts would apply AB 1889's restrictions to specific state funding streams,

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[5] Petitioners' Complaint alleged that AB 1889 could not be applied at all to Medi-Cal funds because this would violate the federal Medicaid Act. J.A. 125-26. The District Court did not reach that issue. Pet. 149a n. 8.

While this case was on appeal, California substantially revised the Medi-Cal funding scheme for subsidizing long-term care, which is the portion of the Medi-Cal program in which the individual Petitioners appear to have participated. Under the Medi-Cal Long Term Reimbursement Act, the State now uses a facility-specific, cost-based reimbursement methodology for long-term care providers. *See* Cal. Stats. 2003, ch. 875, §5 (adopting Cal. Welfare & Institutions Code §14126 *et seq.*).

it bears emphasis that Congress' restrictions on the use of federal money are, on their face, just as broad as AB 1889. The Byrd Amendment provides that "[n]one of the *funds appropriated by any Act* may be expended by the recipient of a Federal contract, grant, loan, or cooperative agreement" to pay a lobbyist in connection with certain federal actions. 31 U.S.C. §1352 (emphasis added). The Byrd Amendment also requires a written certification similar to the certification required by AB 1889. *Compare* 31 U.S.C. §1352 ("(1) Each person who requests or receives a Federal contract, grant, loan, or cooperative agreement from an agency . . . shall file . . . . (2) . . . (B) a certification that the person . . . has not made, and will not make, any payment prohibited by [the Byrd Amendment]") *with* Cal. Gov. Code §16645.2(c) ("the recipient shall provide a certification to the state that none of the funds will be used to assist, promote, or deter union organizing").

Yet the Byrd Amendment, like other broad federal restrictions on the use of government money, has been given a reasonable interpretation, consistent with accepted accounting practices and the First Amendment. For example, the Office of Management and Budget interprets the term "appropriated funds" in the Byrd Amendment to exclude profits and fees earned from dealing with the government. *See* 55 Fed. Reg. 24540, 24542 (June 15, 1990) (Office of Management and Budget, Governmentwide Guidance for New Restrictions on Lobbying) ("Profits and fees earned under Federal contracts . . . are not considered appropriated funds. Profits, and fees that constitute profits, earned under Federal grants, loans, and cooperative agreements are not considered appropriated funds."). AB 1889 is modeled on federal statutes, so the California courts are likely to give AB

1889 a similar interpretation. In any event, and as the Ninth Circuit recognized, how AB 1889 applies to specific funding streams is beyond the scope of Petitioners' facial challenge.

D. The State Does Not Have an Obligation to Subsidize the Activities of Organizations That Voluntarily Choose to Subsist on State Money.

Although Sections 16645.2 and 16645.7 deal only with the use of state funds, Petitioners contend that, for the subset of employers that receive *all their revenues* from the State, the provisions "operate[] as a total ban on federally-protected speech, no different than an outright prohibition." Pet. Br. 43. That is not correct. California does not preclude even those organizations that voluntarily choose to subsist entirely on state grant or program funds from assisting or deterring union organizing. Those organizations are free to use their profits, or any other non-state monies they may have, to pay the costs of lobbying employees about whether to unionize. An organization that voluntarily chooses to subsist entirely on state grants that include no profit component, however, is no more entitled to an additional government grant to pay for an anti-union campaign than it is entitled to receive a private grant for that purpose.

This Court rejected a similar "necessity" argument in holding that the States can decide not to subsidize the costs of abortions even if they subsidize other health care expenses for the indigent. *Maher v. Roe*, 432 U.S. at 474 ("[T]he indigency that may make it difficult and in some cases, perhaps, impossible for some women to have abortions is neither created nor in any way affected by the Connecticut regulation.");

see also Lyng, 485 U.S. at 369 ("[E]ven where the Constitution prohibits coercive governmental interference with specific individual rights, it does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom.") (citations, individual quotation marks omitted).

Likewise, hospitals that claim to be losing money on every Medi-Cal patient they treat (Amer. Hosp. Assn. Br. 4, 17), have no real cause for complaint if they decide to treat only Medi-Cal patients and cannot use their non-existent Medi-Cal profits to assist or deter union organizing. If Medi-Cal pays hospitals "only 83 cents for every dollar of care provided" (*id.*), then the hospitals must necessarily have other, non-Medi-Cal sources of funds. Those funds could be used to assist or deter union organizing.

II. CONGRESS DID NOT INTEND THE NLRA TO FORCE THE STATES TO SUBSIDIZE EMPLOYERS' EFFORTS TO ASSIST OR DETER UNION ORGANIZING.

The "purpose of Congress is the ultimate touchstone" of preemption analysis, *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978), and "[c]onsideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law," *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981); *see also Building & Constr. Trades Council v. Associated Builders & Contractors*, 507 U.S. 218, 224 (1993) ("We are reluctant to infer preemption."). The NLRA contains no express provision preempting state and local laws, so Congress' intent regarding preemption must be gleaned from the structure and objectives of the NLRA. We now turn to that inquiry

and demonstrate that Sections 16645.2 and 16645.7 should not be held preempted.

A. NLRA Section 8(c) Does Not Create Affirmative Employer Speech Rights That Preempt State Laws.

As an initial matter, Petitioners and their *amici* get matters backwards in claiming that the NLRA "protects and encourages noncoercive *employer* speech about union organizing." Pet. Br. 14 (emphasis added). The NLRA protects employees, not employers. To the extent employers have speech rights, those rights stem from the First Amendment, and the NLRA merely accommodates them.

1. Congress adopted the NLRA in 1935 not to "protect[] and encourage[]" employers but because interstate commerce was imperilled by "[t]he denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining." 49 Stat. 449, 449 (1935). The NLRA provides "employees" with federal statutory rights "to self-organization, to form, join, or assist labor organizations [and] to bargain collectively through representatives *of their own choosing*." 29 U.S.C. §157 (emphasis added). To secure those employee rights, Congress made it "an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [29 U.S.C. §157]." 29 U.S.C. §158(a)(1).

Nothing in the NLRA created employer rights that parallel the employee rights set out in NLRA Section 7. Congress also did not seek in the NLRA to provide companies with a special role in the selection of their employees' representatives, any more than Congress

sought to provide employees with a role in selecting company managers. Rather, by adopting the NLRA, Congress sought to protect employees' right to select representatives "of their own choosing" against interference *from their employers.*

After the NLRA was adopted, the National Labor Relations Board initially took the view that because the NLRA grants employees the right to choose "their bargaining representative free from employer interference," the NLRA imposes a "correlative" duty on the employer to "maintain complete neutrality with respect to an election." *American Tube Bending Co.*, 44 NLRB 121, 129 (1942), *enforcement denied*, 134 F.2d 993 (2d Cir.), *cert. denied*, 320 U.S. 768 (1943). This Court initially appeared to express sympathy with the Board's reasoning that *any* employer participation in union organizing campaigns is inherently coercive and upheld a Board requirement that employers remain neutral toward competing unions, stating that even "[s]light suggestions" of employer preference have "a telling effect among men who know the consequences of incurring that employer's strong displeasure." *International Ass'n of Machinists v. NLRB*, 311 U.S. 72, 88 (1940).

This Court subsequently concluded, in *NLRB v. Virginia Electric and Power Co.*, 314 U.S. 469 (1941), and *Thomas v. Collins*, 323 U.S. 516 (1945), that the First Amendment precludes the government from punishing employers for seeking to persuade their employees about unionization, so long as the employers' actions are not coercive:

> [E]mployers' attempts to persuade to action with respect to joining or not joining unions are within the First Amendment's guaranty. . . . When to this persuasion other things are added which

> bring about coercion, or give it that character, the limit of the right has been passed. But short of that limit the employer's freedom cannot be impaired.

Thomas v. Collins, 323 U.S. at 537-38 (citations and footnotes omitted).

When Congress amended the NLRA in 1947 by adopting the Taft-Hartley Act, Congress conformed the NLRA with this Court's recent First Amendment decisions by adding NLRA Section 8(c), 29 U.S.C. §158(c). Section 8(c) does not create new rights. Instead, it modifies the provisions of the NLRA that create unfair labor practice liability by stating that "[t]he expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, *shall not constitute or be evidence of an unfair labor practice* . . . if such expression contains no threat of reprisal or force or promise of benefit." 29 U.S.C. §158(c) (emphasis added).

The congressional proponents of Section 8(c) cited *Thomas v. Collins* to show that the provision would merely confirm a pre-existing First Amendment right. S.Rep. No. 80-105, at 23 (1947), reprinted in 1 NLRB, Legislative History of the Labor-Management Relations Act, 1947, at 407, 429 (1948) (hereinafter "LMRA History"). Senator Taft told his fellow senators that Section 8(c) "in effect carries out approximately the present rule laid down by the Supreme Court of the United States." 93 Cong. Rec. S3953 (daily ed. April 23, 1947), reprinted in 2 LMRA History at 1011. Not surprisingly, then, this Court characterized Section 8(c) in *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969), as "merely implement[ing] the First Amendment."

A year after adoption of the Taft-Hartley Act, the Board itself interpreted Section 8(c) as just an evidentiary rule applicable to unfair labor practice proceedings, not a generally applicable rule that forbids regulation of employer speech. The Board held that it would overturn and re-run a union representation election if the employer's efforts to persuade its employees about unionization, although not including "threat[s]" or "promise[s]" (NLRA §8(c)), nonetheless interfere with the laboratory conditions necessary for employee free choice. *General Shoe Corp.*, 77 NLRB 124, 127 n.10 (1948) ("It should be noted that Congress only applied the new Section 8(c) to unfair labor practice cases. Matters which are not available to prove a violation of law, and therefore to impose a penalty upon a respondent, may still be pertinent, if extreme enough, in determining whether an election satisfies the Board's own administrative standards.").[6]

If NLRA Section 8(c) had created a type of generally applicable employer speech "right," then the Board could not have rules restricting activities that unquestionably fall within Section 8(c). But the Board's conclusion that NLRA Section 8(c) is just an evidentiary rule about unfair labor practice liability—and nothing more—is compelled by the

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[6] *See also Fiber Indus., Inc.*, 267 NLRB 840, 841 n.4 (1983) ("[I]t is well settled that Sec. 8(c) applies only to unfair labor practice proceedings"); *Borden Mfg. Co.*, 193 NLRB 1028, 1034 (1971) (rejecting employers' arguments that their speeches to employees "were protected by Section 8(c) of the Act," and holding that "Section 8(c) is not applicable to representation cases."); *see also Dal-Tex Optical Co.*, 137 NLRB 1782, 1787 n.11 (1962) ("Congress specifically limited Section 8(c) to the adversary proceedings involved in unfair labor practice cases and it has no application to representation cases.").

plain language of the provision. *See Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-54 (1992) ("We have stated time and again that the courts must presume that a legislature says in a statute what it means and means in a statute what it says there."). Even if the plain language were not so clear, the Board's contemporaneous and consistent interpretation of Section 8(c) in formal decisions still would be entitled to deference. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984); *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891 (1984).[7]

The NLRA, in short, does not "protect and encourage" *employer* speech. To the contrary, the Act protects and encourages "employees" in exercising their right to select representatives "of their own choosing," and the Act accomplishes this by regulating employer activities that interfere with this employee right. *See UAW-Labor & Employment & Training Corp. v. Chao*, 325 F.3d 360, 364-65 (D.C. Cir. 2003) ("[T]he activities described in §8(c) . . . are not 'protected *by*' the NLRA, except from the NLRA itself.") (emphasis in original).

2. In any event, even if NLRA Section 8(c)—which "merely implements the First Amendment" (*Gissel*, 395 U.S. at 617) by placing some limits on unfair labor practice liability—were viewed as a type of mini-First Amendment that accords certain employer speech about unionization the same protections from

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[7] By contrast, the arguments set out in the United States' *amicus* brief are not entitled to deference. Congress entrusted the courts, not an agency, with the task of determining which state laws Congress intended the NLRA to preempt. The arguments in the *amicus* brief pertaining to labor preemption also are just a litigation position.

all government interference that the First Amendment provides for core political speech, the distinction between penalizing expressive activities and refusing to subsidize them is a well-established First Amendment distinction. *See Rust v. Sullivan,* 500 U.S. at 192-93, 196-97, 201-02; *Regan v. Taxation With Representation*, 461 U.S. at 545-46, 549-50; *Cammarano v. United States*, 358 U.S. at 512-13.

Petitioners assert that there is no difference between prohibiting the use of *state* funds to assist or deter union organizing and "*denying* funds to organizations that engage in that speech," except that one government action may be "less draconian" than the other. Pet. Br. 41 (emphasis in original). But the distinction between regulating the use of government money and precluding the recipients of government funds from engaging in protected activities with private money is precisely the fundamental distinction this Court has drawn. *See Rust v. Sullivan*, 500 U.S. at 196-197 ("[O]ur 'unconstitutional conditions' cases involve situations in which the government has placed a condition on the recipient of the subsidy, rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program."); *see also Harris v. McCrae*, 448 U.S. at 317 n.19. The distinction makes sense because, when the government acts solely to restrict the use of its subsidies, the scope of the restriction is co-extensive with the government's legitimate interests.

Thus, even if Congress had in fact intended Section 8(c) as a type of mini-First Amendment for employer lobbying efforts to assist or deter union organizing, that would not establish that Congress intended the

NLRA to require the States to *subsidize* such efforts when the First Amendment does not require government subsidies for even the most valuable political speech.[8] There still would be no explicit or implicit conflict between NLRA Section 8(c) and the California Government Code sections at issue, so NLRA Section 8(c) simply will not bear the weight that Petitioners and their *amici* place upon it.

B. AB 1889 Does Not Regulate Activities Congress Intended to Remain Unregulated.

The AB 1889 sections at issue also cannot be squeezed into the class of laws that are preempted by the NLRA under the so-called *Machinists* preemption doctrine. Under that doctrine, the States are foreclosed from regulating the use of "economic weapons" during labor disputes that Congress intended to remain wholly unregulated and, therefore, "to be controlled by the free play of economic forces." *Machinists*, 427 U.S. at 147.

As a threshold matter, and by itself dispositive, "[t]he *Machinists* rule creates a free zone from which all regulation, whether federal or State, is excluded." *Golden State Transit Corp. v. Los Angeles*, 493 U. S. 103, 111 (1989) (citation, internal quotation marks omitted). Congress could not have intended *the per-*

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[8] We note that in *Linn v. United Plant Guard Workers*, 383 U.S. 53 (1966), which (unlike this case) involved direct state regulation of speech during union organizing campaigns, the Court held that the NLRA does not preempt state-law defamation actions if, and only if, the plaintiff proves actual malice. The Court thereby extended to labor speech "by analogy" the same protections the First Amendment provides for speech about public officials (*id.* at 65), not *greater* protections.

missible uses of government funds—which is the issue that Sections 16645.2 and 16645.7 address—to be a "free zone from which all regulation . . . is excluded."

California and other states, like the federal government, must have rules about how government money may and may not be spent by recipients. Those rules must include some regulation of whether, for example, a company receiving a government grant to conduct medical research may use some of that grant money to pay for the costs of lobbying the laboratory employees about whether to unionize. Such rules regulate the use of government money, not the underlying activities. *See Regan*, 461 U.S. at 546 ("Congress has not . . . regulated any First Amendment activity. Congress has simply chosen not to pay for TWR's lobbying."). Under Petitioners' theory, even the exclusion of persuader expenses from the category of reimbursable costs would be preempted under *Machinists*.

Equally to the point, *Machinists* preemption cases all concern attempts by state and local governments or the NLRB to regulate the use of "economic weapons" (*e.g.*, strikes, lockouts, picketing) by unions and employers. Such efforts are impermissible if the NLRA shows that Congress intended the "conduct . . . to remain a part of the self-help remedies left to the combatants in labor disputes." *Belknap, Inc. v. Hale*, 463 U.S. 491, 499 (1983).[9] Employer efforts to lobby

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[9] *See, e.g., Machinists*, 427 U.S. at 135-36, 155 (state precluded from regulating union's concerted refusal to work overtime during collective bargaining negotiations); *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 479, 490, 497, 500 (1960) (NLRB precluded from finding that union committed unfair labor practice by engaging in on-the-job slow-down and sit-in activities); *Chamber of Commerce v. Reich*, 74 F.3d 1322,

employees about whether to unionize are not an "economic weapon" in the sense used in the *Machinists* cases. *Cf. Chao*, 325 F.3d at 363 ("No claim is made that the posting of employees' *Beck* rights represents an economic weapon—certainly not one covered by *Machinists* preemption").

Machinists preemption also is a species of field preemption that "creates a free zone from which *all regulation*, whether federal or State, is excluded." *Golden State*, 493 U.S. at 111 (emphasis added). But employer efforts to assist or deter union organizing *are* regulated by the NLRB. As part of the NLRB's responsibility to supervise union representation elections, the Board *does* regulate employer lobbying efforts that, even if they do not involve a "threat of reprisal or force or promise of benefit," (NLRA §8(c)), still "destroy[] the laboratory conditions in which the Board must hold its elections and prevent[] the employees' expression of a free choice." *Dal-Tex Optical Co.*, 137 NLRB 1782, 1787 (1962); *see also General Shoe Corp.*, 77 NLRB at 127.

The Board will overturn the results of representation elections if the employer violates the Board's many rules that regulate speech that would be "protected" from unfair labor practice liability by NLRA §8(c). *See, e.g., Peerless Plywood Co.*, 107 NLRB 427, 428-30 (1953) ("[W]e now establish an election rule which will be applied in all election cases. This rule shall be that employers and unions

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1334, 1339 (D.C. Cir. 1996) (federal government's executive branch could not penalize employers for hiring permanent replacements during strikes); *Cannon v. Edgar*, 33 F.3d 880, 885-86 (7th Cir. 1994) (state could not require union and employer to negotiate to establish pool of replacement workers to be used during labor disputes).

alike will be prohibited from making election speeches on company time to massed assemblies of employees within 24 hours before the scheduled time for conducting an election. Violation of this rule will cause the election to be set aside whenever valid objections are filed."); *Peoria Plastic Co.*, 117 NLRB 545, 546-48 (1957) ("[W]e have . . . consistently condemned the technique of calling all or a majority of the employees in the unit into the employer's office individually or calling upon them at their homes to urge them to reject a union as their bargaining representative as conduct calculated to interfere with the free choice of a bargaining representative *regardless of whether or not the employer's actual remarks were coercive in character*") (emphasis added); *Rosewood Mfg. Co.*, 263 NLRB 420, 420 (1982) (setting aside election because employers' campaign "linking the selection of the union with unprofitability, low productivity, subsequent plant closure, and loss of jobs" interfered with employee free choice—regardless of whether the employers' campaign "was . . . protected [from unfair labor practice liability] by Section 8(c) of the Act").

All that being so, AB 1889 does not implicate the *Machinists* doctrine.

C. AB 1889 Does Not Interfere with the Jurisdiction of the NLRB.

The AB 1889 provisions at issue also do not fall within the class of laws that are preempted under the *Garmon* doctrine, which precludes state and local regulation of activities that are "protected by §7 of the [NLRA] or constitute an unfair labor practice under §8 [of the NLRA]." *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 244 (1959). "The

Garmon rule is intended to preclude state interference with the National Labor Relations Board's interpretation and active enforcement of the integrated scheme of regulation established by the NLRA." *Golden State Transit Corp. v. Los Angeles*, 475 U.S. 608, 613 (1986) (internal quotation marks omitted).

There is no serious argument that Sections 16645.2 and 16645.7 regulate activities "protected by §7" of the NLRA (*Garmon*, 359 U.S. at 244), because NLRA Section 7 provides rights to "employees"—not employers. *See* pp. 31-35, *supra*.

Nor do Sections 16645.2 and 16645.7 regulate activities that "constitute an unfair labor practice under §8" of the NLRA. Sections 16645.2 and 16645.7 regulate the use of government money, not labor relations activities. As in *Regan*, in which the Court recognized that "Congress has not . . . regulated any First Amendment activity[; it] has simply chosen not to pay for . . . lobbying" (461 U.S. at 546), California is not regulating NLRA activity; it has simply chosen not to pay with its state grant and program funds for Petitioners to lobby their employees about unionization.

California's regulation of the permissible uses of state money also does not involve the State drawing a different line than the Board between permissible and impermissible persuader activities. Sections 16645.2 and 16645.7 prohibit the use of state grant and program funds to pay for activities to assist or deter union organizing regardless of the form those activities take, so an enforcement proceeding under AB 1889 would not require the state courts to resolve any issues that Congress delegated to the NLRB for resolution.

The United States, as *amicus curiae*, asserts that because AB 1889's application to employers' non-coercive speech is preempted under the *Machinists* doctrine, the state courts enforcing AB 1889 would have to decide whether employer speech is coercive, and that this inquiry would intrude on the jurisdiction of the NLRB. U.S. Br. at 25-26. But we already have demonstrated that the AB 1889 provisions at issue are *not* preempted under the *Machinists* doctrine, so this entirely bootstrapped argument for *Garmon* preemption collapses as well.

This case also is not analogous to *Wisconsin Department of Industry v. Gould*, 475 U.S. 282 (1986), in which a state legislature sought to punish employers for violating the NLRA by debarring employers that committed NLRA unfair labor practices from doing business with the State. No one disputed that the purpose of the law at issue in *Gould* was *punishment* and that the punishment was for violating federal labor law. *See* 475 U.S. at 287 ("the debarment statute serves plainly as a means of enforcing the NLRA" and "[n]o other purpose could credibly be ascribed").

The Court held that the States are precluded from creating a "supplemental sanction for violations of the NLRA" (*id.* at 288), even through the exercise of their spending power, because this interferes with the enforcement role Congress vested in the Board. *Cf. Crosby v. National Foreign Trade Council*, 530 U.S. 363, 373-74, 376 (2000) (Massachusetts law that "impos[ed] a . . . state system of economic pressure against the Burmese political regime" by barring state agencies from purchasing from companies that conduct business in Burma, was preempted by federal sanctions law).

In this case, California has not sought to *punish* employers that assist or deter union organizing. California has merely declined to subsidize that activity. As this Court has held in many other cases, a "refusal to subsidize certain protected conduct . . . . cannot be equated with the imposition of a 'penalty' on that activity." *Harris v. McRae*, 448 U.S. at 317 n.19. Sections 16645.2 and 16645.7 are not a supplemental "means of enforcing the NLRA" (*Gould*, 475 U.S. at 287), since the use-of-funds restriction is not dependent on whether the activity violates the NLRA. Nor are Sections 16645.2 and 16645.7 a means of enforcing a state-law regulation of permissible conduct during union organizing campaigns, since the use-of-funds restriction is not dependent on what form employer lobbying activity takes.

D. Congress Would Not Have Intended to Intrude on the States' Sovereign Authority to Control the Use of Their Own Funds.

Finally, even if NLRA preemption doctrines otherwise were implicated, the Court has recognized that these doctrines are judicially created and should not be applied inflexibly when state regulation involves "interests . . . deeply rooted in local feeling and responsibility." *Garmon*, 359 U.S. at 244. Under such circumstances, the courts should not, "in the absence of compelling congressional direction, . . . infer that Congress ha[s] deprived the States of the power to act." *Id.*; *see also Belknap*, 463 U.S. at 498.

As the Ninth Circuit recognized, "a state's control of its purse strings is of at least as great a concern to the state as its power to regulate defamatory speech, violence, trespass, obstruction of access to property or

the intentional infliction of emotional distress" – all areas in which the Court has recognized that NLRA preemption principles cannot be applied inflexibly. Pet. 31a & n.19. The "vital field of financial administration," *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 54 (1947), is unquestionably within a state's proper sphere of authority when state funds are involved, and "[i]t is an essential attribute of the States' retained sovereignty that they remain independent and autonomous within their proper sphere of authority," *Printz v. United States*, 521 U.S. 898, 928 (1997); *see also Alden v. Maine*, 527 U.S. 706, 750-51 (1999) ("[T]he allocation of scarce resources among competing needs and interests lies at the heart of the political process" and "the balance between competing interests must be reached after deliberation by the political process established by the citizens of the State"). Forcing a state to *subsidize*, against its will, private political and ideological activities, is an intrusion on core state sovereignty.

Congress' adoption of restrictions on the use of *federal* grant and program funds to "assist, promote, or deter union organizing" shows that Congress did not believe that government subsidies are necessary for the NLRA to operate successfully. Petitioners criticize the Ninth Circuit for observing that "'[t]he fact that Congress itself has . . . imposed the same type of restriction . . . as a state seeks to impose . . . is surely evidence that Congress does not view such a restriction as incompatible with its labor policies.'" Pet. 21a (quoting *De Veau v. Braisted*, 363 U.S. 144, 156 (1960) (plurality opinion)). Petitioners point out, correctly, that these federal funding restrictions do not "implicitly repeal[] . . . the NLRA." Pet. Br. 40 n. 7. But there is no provision of the NLRA to

"implicitly repeal" because the NLRA itself says nothing about the preemption of state laws.

Rather, at least in the absence of an explicit conflict between a provision of the NLRA and a provision of state law, NLRA preemption doctrines must be based on judicial inferences about Congress' intent. Congress' own adoption of restrictions on the use of federal funds that are similar to AB 1889's restriction on the use of state funds makes it impossible to conclude that there is a "compelling congressional direction" to "infer that Congress ha[s] deprived the States of the power to act." *Garmon*, 359 U.S. at 244; *cf. Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65 (1989) ("Congress should make its intentions clear and manifest if it intends to pre-empt the historic powers of the States.") (internal quotation marks omitted).

III. THE RECORD AND THIS COURT'S CASES DO NOT SUPPORT PETITIONERS' ARGUMENTS ABOUT THE ALLEGED BURDENS AND CHILLING EFFECTS OF AB 1889.

A. Petitioners' central contention is that California can never, under any circumstances, preclude private employers from using state grant or program funds to assist or deter union organizing (at least not if those state grant or program funds can be used to pay ordinary employee-relations expenses). But Petitioners also appear to contend that, even if the core use-of-funds restrictions in Sections 16645.2(a) and 16645.7(a) are not by themselves preempted by the NLRA, these provisions still must be invalidated

because AB 1889's accounting requirements impermissibly chill employer speech.[10]

Whether compliance with AB 1889 would be too onerous, as Petitioners claim, is initially a factual question about the extent of those compliance burdens. And the record requires rejection of Petitioners' argument.

When Petitioners moved for summary judgment, they submitted a list of the material facts they asserted to be unopposed, none of which concerned accounting burdens. J.A. 337-47. Petitioners did proffer declarations in which their members stated in conclusory fashion that AB 1889 would impose onerous compliance burdens. *E.g.*, J.A. 135-36, 158-59, 163, 166-68. But Respondents properly objected to those declarations because they lacked foundation. D.Ct. Doc. No. 104 (Defendant's Objections to Evidence) ¶¶ 6, 8, 9, 12); D.Ct. Doc. No. 112 (Intervenors' Objections to Evidence) ¶¶ 9, 11, 19, 20, 23-26. Respondents also submitted expert testimony

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[10] Even if AB 1889's enforcement provisions did bring the measure into conflict with the NLRA, the proper remedy would be to sever the offending provision, not to strike down the entire statute. AB 1889's provisions are contained in separate sections of the statute, and the statute includes a very strong severability provision, Cal. Gov. Code §16649. *See Dalton v. Little Rock Family Planning Servs.*, 516 U.S. 474, 476 (1996) ("In a pre-emption case such as this, the state law is displaced only to the extent that it actually conflicts with federal law") (internal quotation marks omitted). Petitioners have never sought such relief with respect to AB 1889's enforcement provisions. *Cf. Regan*, 461 U.S. at 544 n.6 ("We also note that TWR did not bring this suit because it was unable to operate with the dual structure and seeks a less stringent set of bookkeeping requirements. Rather, TWR seeks to force Congress to subsidize its lobbying activity.").

that AB 1889's "accounting and recordkeeping requirements . . . are similar to requirements imposed in other contexts," are "significantly less burdensome than the detailed requirements for federal grant recipients," and allow "flexibility in establishing proper accounting procedures and controls." J.A. 280-83. The trial court received no additional evidence on this issue before granting summary judgment to Petitioners, and the trial court did not address the alleged compliance burdens in its summary judgment decision. *See* Pet. 140a-149a.

On an appeal from an order granting summary judgment, all disputed facts must be resolved in favor of the non-moving party. *See General Elec. Co. v. Joiner*, 522 U.S. 136, 143 (1997). The Ninth Circuit therefore correctly dismissed Petitioners' arguments about accounting burdens as in direct conflict with the record on appeal. Pet. 4a-5a n.2.

B. Petitioners' complaints about onerous accounting burdens are also implausible. The state law does not require employers to file special reports or keep special financial records. All it requires is that "state funds" not be "commingled" with other funds (Cal. Gov. Code §16646(b)), and that the recipients of state grant and program funds "maintain records sufficient to show" that state funds were not used to "assist, promote, or deter" union organizing (§16645.2(c); §16645.7(c)). The state law provides expressly that it does not "require[] employers to maintain records in any particular form." §16648.[11]

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[11] AB 1889's definition of which expenses count as lobbying expenses appears to have been borrowed from the Internal Revenue Code. *Compare* Cal. Gov. Code §16646 ("[A]ny expense . . . incurred for research of, or preparation, planning, or

By contrast, in *Regan,* a non-profit organization that wished to engage in First Amendment-protected lobbying activity was required to set up an entirely separate organization for that purpose. This Court rejected the argument that this requirement was so onerous as to chill protected activity: "[T]he two groups [must] be separately incorporated and keep records adequate to show that tax deductible contributions are not used to pay for lobbying. *This is not unduly burdensome.*" *Regan*, 461 U.S. at 544 n. 6 (emphasis added). Likewise, in *Rust v. Sullivan*, recipients of federal funds that wished to counsel patients regarding abortion were required to establish separate entities that are "physically and financially separate" from other activities; "[m]ere bookkeeping separation of [federal funds] from other monies is not sufficient." *Rust*, 500 U.S. at 180. In this case, the creation of separate entities is not required to comply with AB 1889.

Petitioners say that this Court has "sometimes invalidated" accounting requirements as an impermissible burden on protected speech (Pet. Br. 45), but this Court has *never* concluded that it is too burdensome for recipients of government subsidies to account for how they spend that government money. After all, as this Court has recognized, "[p]rotection of the public fisc requires that those who seek public funds act with scrupulous regard for the require

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coordination of, or carrying out, an activity to assist, promote, or deter union organizing shall be treated as paid or incurred for that activity") *with* 26 U.S.C. §162(e)(5)(C) ("Any amount paid or incurred for research for, or preparation, planning, or coordination of [certain lobbying activities] shall be treated as paid or incurred in connection with such activity").

ments of the law." *Heckler v. Community Health Svs.*, 467 U.S. 51, 63 (1984). The sole decision that petitioners rely upon for this point, the plurality opinion in *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986), did not involve government subsidies at all. It involved an "as applied" challenge to a campaign finance regulation that controlled the use of purely private funds. The regulation would have required a small non-profit organization to adopt a much more formal structure to engage in political activity, and it also would have limited the organization to soliciting funds from its own few members, instead of from the general public. Those aspects of the campaign finance regulation—not the campaign finance disclosure obligations—were what led Justice O'Connor, who cast the deciding vote in the case, to conclude the regulation placed an impermissible burden on protected speech as applied to that small, informal, non-profit organization. *See* 479 U.S. at 265-66 (O'Connor, J., concurring).

By contrast, in this case the recipients of state grant and program funds should have no difficulty keeping track of their expenditures of public funds. They already must have systems in place to account for the expenditure of the government money they receive. Participants in the Medi-Cal program, for example, have been required for many years to maintain detailed accounting records and provide them to the State. *See, e.g.*, 22 Cal. Code Regs. §51511.2 (requiring "all skilled nursing and intermediate care facilities participating in the Medi-Cal program" to "maintain a uniform accounting system as specified by the California Health Facilities Commission," submit "[a]nnual cost reports . . . in the format prescribed by the State," and "maintain . . . financial

. . . records . . . in sufficient detail to substantiate the cost data reported," which "shall be made available to State . . . representatives upon request."). California's state Medi-Cal plan precludes Medi-Cal participants from including, on their cost reports, any expenditures to "assist, promote or deter union organizing" (J.A. 244-57), so Medi-Cal participants already would have to track the expenditures covered by AB 1889, and maintain exactly the financial records about which Petitioners are complaining.

Some of the Petitioners also receive money from the federal Workforce Investment Act. *See* D.Ct. Doc. No. 136 (Defendants' Request for Judicial Notice), Ex. 1; D.Ct. Doc. No. 109 (Decl. of Scott A. Kronland in Opp. to Pl. Mot. for Summ. J.), Ex. 7 at 11:6-13:12. That statute requires recipients to "provide to the Secretary [of Labor] assurances that none of such funds will be used to assist, promote, or deter union organizing." 29 U.S.C. §2921(b)(7). Organizations that can comply with the federal act can comply with the state statute that is in pari materia when they receive employee training money from the program administered by California's Employment Training Panel. *See* pp. 25-26, *supra* (describing the state program). Petitioners also acknowledge that there is a "standard requirement, in California and elsewhere, that public funds may go only toward grant-related purposes and expenses" (Pet. Br. 35), so individual grants received by Petitioners' members already would require them to account for how they spend the government grant money they receive. Petitioners complain about burden, but it is a commonplace that employees whose salaries are paid in part with government money must track and allocate their time. *See, e.g.*, 45 C.F.R. §1630.3(d)

(cost principles for recipients of Legal Services Corporation funding).[12]

C. It also bears mention that, under this Court's decisions, labor unions—including small, local unions—must adhere to far more burdensome accounting requirements than those contained in AB 1889 if those unions wish to exercise their constitutional rights to spend dues money for political or ideological purposes. *See generally Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977); *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986); *Lehnert v Ferris Faculty Ass'n*, 500 U.S. 507 (1991); *Communication Workers of America v. Beck*, 487 U.S. 735 (1988).

To ensure that objecting non-members are not charged for political and ideological expenses, unions that spend money on such activity must, among other things, keep track of all expenditures, including on employee salaries, and break them down into "chargeable" and "non-chargeable" categories; issue an annual notice giving non-members sufficient information to decide whether to challenge the union's allocation of expenses; have their books audited; provide a procedure for non-members to

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[12] Petitioners rely upon the California Governor's veto message for a "predecessor" bill to AB 1889 as evidence that AB 1889 would impose onerous compliance burdens. Pet. Br. 44. But that predecessor bill, unlike AB 1889, imposed significant burdens on employers, including reporting obligations. Cal. Assem. Bill No. 442, as enrolled Sept. 9, 1999 (1999-2000 Reg. Sess.), §16318(g)(4), (5). AB 1889 imposes no such obligations and specifies that records need not be kept "in any particular form." The same Governor who vetoed the predecessor bill as too burdensome then signed AB 1889, so the most natural inference from the legislative history is that the Governor was aware of this issue and did not believe the new bill, AB 1889, imposed serious burdens.

challenge the amount of the agency fee before an impartial decisionmaker; and hold disputed amounts in escrow while challenges are pending. *See Hudson*, 475 U.S. at 305-10 & n.18; *see also Harik v. California Teachers Ass'n*, 326 F.3d 1042, 1048-49 (9th Cir. 2003); LABOR UNION LAW AND REGULATION 452-481 (BNA 2003). Yet labor organizations continue to engage in political activity.

This Court also rejected the claim that it would be too burdensome for the State Bar of California to comply with the accounting and audit requirements of *Chicago Teachers v. Hudson* to ensure that mandatory bar dues are not used to fund ideological, non-germane activities. *Keller v. State Bar of Cal.*, 496 U.S. 1, 16-17 (1990) ("It is noteworthy that unions representing government employees have developed, and have operated successfully within [these] procedures for over a decade") (internal quotation marks omitted).

D. For similar reasons, Petitioners' contention that the penalty and private enforcement provisions of AB 1889 would chill their lobbying activity about unionization cannot be accepted on the present record. If it is not difficult to keep the records necessary to comply with this law, which are comparable to those required by the similar federal statutes, then Petitioners need not fear the penalties in the statute or private lawsuits. The state courts are competent to dispose of frivolous litigation.

There are many statutes that impose penalties for the misuse of government funds for political or ideological activities, and they have not chilled the recipients of government subsidies from continuing to engage in such activities. *See, e.g.*, 2 U.S.C. §437g(c)(4)(C)(II),(d) (authorizing penalties for viola-

tions of federal campaign finance law); 31 U.S.C. §1352(c) (establishing penalties for violating prohibition on use of federal funds for lobbying activity).

The authorization of private *qui tam* proceedings to recover mis-spent government money also has not chilled organizations from accepting such money. Unlike AB 1889, the federal False Claims Act even offers private litigants a share of the recovered funds as a bounty. 31 U.S.C. §3730(d). If AB 1889 did not include its own authorization for *qui tam* suits, California's little False Claims Act, Cal. Gov. Code §12650 *et seq.*, would appear to authorize such actions anyway against recipients of state grant and program funds that falsely certify compliance with AB 1889. To be sure, like every statute that contains a private enforcement provision, AB 1889 could be used for harassment purposes. But the state courts have authority to impose sanctions for abusive litigation (*see, e.g.*, Cal. Code Civ. Proc. §128.7), and there is no basis for distinguishing AB 1889 from all other statutes in this regard.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

JONATHAN P. HIATT
815 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 637-5053

STEPHEN P. BERZON
SCOTT A. KRONLAND *
STACEY M. LEYTON
ALTSHULER BERZON LLP
177 Post Street, Suite 300
San Francisco, CA 94108
(415) 421-7151

Counsel for Respondents American Federation of Labor and Congress of Industrial Organizations and California Labor Federation

* Counsel of Record

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In The

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CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, ET AL.,

Petitioners,

v.

EDMUND G. BROWN JR., in his capacity as Attorney General of the State of California, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE STATE RESPONDENTS

EDMUND G. BROWN JR.
Attorney General of the State of California
JANET GAARD
Chief Assistant Attorney General
MANUEL M. MEDEIROS
Solicitor General
GORDON BURNS
Deputy Solicitor General
LOUIS VERDUGO, JR.
Senior Assistant Attorney General
RICHARD T. WALDOW
Supervising Deputy Attorney General
ANGELA SIERRA
Supervising Deputy Attorney General
State Bar No. 126374
(Counsel of Record)

300 South Spring Street
Los Angeles, CA 90013
Telephone: (213) 620-6312
Fax: (213) 897-7605

Counsel for the State Respondents

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether California Government Code sections 16645.2 and 16645.7, which prohibit state grant and program fund recipients from using those state funds "to assist, promote, or deter union organizing," are preempted by the National Labor Relations Act, 29 U.S.C. §§ 151-169.

PARTIES TO THE PROCEEDINGS

Respondents accept the listing of the Parties to the Proceedings set forth in the Brief for Petitioners except that the reference to respondent Frank G. Vanacore should be to John Fukusawa as the Chief of the Audit Review and Analysis Section of the California Department of Health Care Services (formerly known as the Department of Health Services), and the reference to respondent Diana M. Bonta should be to Sandra Shewry, Director of the California Department of Health Care Services.

The California Department of Health Care Services (formerly known as the Department of Health Services) is not a respondent in this matter. Although originally a defendant, the District Court dismissed the agency from this action. J.A. 66-67, Docket Entries 82 & 83 (District Court Dismissal). The petitioners did not appeal the dismissal of the Department of Health Services, and the Department was not named in respondents' notice of appeal. J.A. 83, Docket Entry 175 (Notice of Appeal).

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STATEMENT

1. The California legislature enacted Government Code sections 16645-16649[1] (AB 1889) to implement California's policy to remain neutral on union organizing. 2000 Cal. Stat. ch. 872, § 1. In order to avoid subsidizing employers' activities to support or oppose union organizing, the statute prohibits employers from using state funds and facilities for those purposes. *Id.* As the legislature declared in AB 1889's preamble, "the state should not subsidize efforts by an employer to assist, promote, or deter union organizing" because it is "the policy of the state not to interfere with an employee's choice about whether to join or to be represented by a labor union." *Id.*

The provisions of AB 1889 that are at issue in these proceedings are those which prohibit an employer's use of state grant or program funds "to assist, promote, or deter union organizing." Cal. Gov't Code §§ 16645.2, 16645.7. These provisions allow recipients of state grant and program funds to spend their non-state funds to lobby employees about union organizing. Government Code section 16645.7 provides that, "[a] private employer receiving state funds in excess of ten thousand dollars ($10,000) in any calendar year on account of its participation in a state program shall not use any of *those* funds to assist, promote, or

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[1] Unless otherwise noted, all citations to Cal. Gov't Code §§ 16645-16649 are to the 2008 supplement.

deter union organizing." Cal. Gov't Code § 16645.7(a) (emphasis added); *see also* Cal. Gov't Code § 16645.2(a) ("[t]he recipient of a grant of state funds, including state funds disbursed as a grant by a public agency, shall not use the funds to assist, promote, or deter union organizing.").

These provisions of AB 1889 were modeled after several federal laws that similarly restrict the use of federal funds. Those laws include the federal Head Start Programs Act, which prohibits the use of appropriated funds "to assist, promote, or deter union organizing," 42 U.S.C. § 9839(e) (2008); the Workforce Investment Act, which requires "[e]ach recipient of [grant] funds . . . [to] provide to the Secretary assurances that none of such funds will be used to assist, promote, or deter union organizing," 29 U.S.C. § 2931(b)(7) (2008); and the National and Community Service Act, which provides that "[a]ssistance [available under a grant] provided under this subchapter shall not be used by program participants . . . to assist, promote, or deter union organizing," 42 U.S.C. § 12634(b)(1) (2008). Each of these federal laws was expressly referenced in the legislative committee's bill analysis prepared for the California Assembly. J.A. 75, Docket Entry 125 (Request by Intervenors for Judicial Notice).

AB 1889 contains several enforcement provisions that apply to its restrictions on the use of state grant and program funds. Employers who receive state grant or program funds must certify that those state funds will not be used to assist, promote or deter

union organizing. Cal. Gov't Code §§ 16645.2(c), 16645.7(b). Recipients must also "maintain records sufficient to show that *state funds* have not been used" for those purposes and must provide those records to the California Attorney General upon request. Cal. Gov't Code § 16645.2(c) (emphasis added); *see also* Cal. Gov't Code § 16645.7(c).

"For purposes of accounting for expenditures" under AB 1889, "if state funds and other funds are commingled, any expenditures to assist, promote, or deter union organizing shall be allocated between state funds and other funds on a pro rata basis." Cal. Gov't Code § 16646(b). However, this legislation expressly provides that "[n]othing in [AB 1889] requires employers to maintain records in any particular form." Cal. Gov't Code § 16648.

An employer who violates AB 1889 is liable for the amount of the state funds spent on activities supporting or opposing union organizing, a civil penalty of twice the amount of the expenditure, and reasonable attorney fees and costs. Cal. Gov't Code §§ 16645.2(d), 16645.7(d), and 16645.8(d). Civil actions may be brought by the California Attorney General or by any taxpayer, on behalf of the people of the State of California. Cal. Gov't Code § 16645.8(a).

2. This writ of certiorari proceeding arises from the ruling on a motion for summary judgment filed below by petitioners, seven business associations and three businesses that operate skilled nursing facilities (collectively referred to as "the Chamber of Commerce").

The district court granted, in part, the Chamber of Commerce's summary judgment motion, concluding that California Government Code sections 16645.2 and 16645.7 are "preempted [by the National Labor Relations Act (NLRA)] because [they] regulate[] employer speech about union organizing under specified circumstances, even though Congress intended free debate." Pet. App. 147a, 149a. The district court entered a partial final judgment declaring Sections 16645.2 and 16645.7 "invalid as applied to employers covered by the [NLRA]" and enjoining respondents from enforcing those provisions. J.A. 349.

3. The Ninth Circuit initially issued a panel opinion affirming the district court. Pet. App. 114a. On rehearing, the court withdrew that opinion and issued a new opinion, again affirming the district court, but this time with a dissent. Pet. App. 58a. The Ninth Circuit then reheard the case en banc. The en banc court issued a 12-3 decision that reversed the district court's grant of partial summary judgment and remanded the case for further proceedings. Pet. App. 1a, 36a.

The en banc court began its analysis by explaining that a facial challenge to legislation is "'the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid.'" Pet. App. 7a (*quoting Rust v. Sullivan*, 500 U.S. 173, 183 (1991)). After determining that AB 1889's grant and program provisions do not fall within the "market participant exception" to NLRA preemption, the

en banc court held that AB 1889's grant and program provisions are not preempted under the *"Machinists"* or *"Garmon"* preemption doctrines, referring to the doctrines established in, respectively, *Lodge 76, International Ass'n of Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976) (*Machinists*) and *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959) (*Garmon*). Pet. App. 11a-36a.

Central to the en banc court's holding that AB 1889 is not preempted under *Machinists* is the distinction between restrictions on "the *use* of state funds," which do not preclude the recipient from using its own funds to engage in activities the state does not wish to subsidize, and conditions placed upon "the *receipt* of state funds," such as requiring recipients to remain neutral in union organizing disputes as a condition of receiving state money. Pet. App. 17a. The court recognized that the AB 1889 provisions at issue fall within the former category. *Id.* Accordingly, the en banc court determined that AB 1889's grant and program provisions are not preempted under *Machinists*, because that doctrine "requires the preemption of any state regulation of activity that, although not directly regulated by the NLRA, was intended by Congress 'to be controlled by the free play of economic forces,'" in a "'zone free from all regulations, whether state or federal.'" Pet. App. 13a (*quoting Machinists*, 427 U.S. at 140 and *Building & Constr. Trades Council v. Associated Builders & Contractors*, 507 U.S. 218, 226 (1993) (*Boston Harbor*)). As the en banc court explained, it is

"implausible" that Congress would have intended the use of state grant and program funds to be left to the free play of economic forces "when the state's choices of how to spend its funds are by definition not controlled by the free play of economic forces." Pet. App. 16a-17a.

The en banc court also reasoned that because *Machinists* "applies *solely* to zones of activity left free from *all* regulation," the National Labor Relations Board's (NLRB) "own extensive regulation of organizing activities demonstrates that *organizing* – and employer speech in the context of organizing – is not such a zone." Pet. App. 19a.[2] The majority further explained that the very similar restriction on the use of federal government funds adopted by Congress (see p. 2, *supra*) is inconsistent with the view that California is regulating "'conduct intended to be unregulated.'" Pet. App. 20a-21a (*quoting Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 614 (1986) (*Golden State I*)).

With respect to *Garmon*, the Ninth Circuit held that California's law does not interfere with employer speech rights protected by 29 U.S.C. § 158(c) (Section

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[2] The majority also explained, earlier in its opinion, that although case precedent "strongly suggest[s] that the *Machinists* doctrine is not likely to apply to organizing," it "need not resolve whether *Machinists* extends to preempting a state action that potentially affects organizing, because even if it did, AB 1889 would not be preempted under the *Machinists* doctrine." Pet. App. 16a.

8(c) of the NLRA). Pet. App. 23a-25a. The en banc court reasoned that Section 8(c) "does not *grant* employers speech rights" in the sense necessary for *Garmon* preemption. Pet. App. 23a. The en banc court observed that Section 8(c), which clarifies that an employer's noncoercive speech does not constitute an unfair labor practice, "'merely implements the First Amendment.'" Pet. App. 23a (*quoting NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969)). The en banc court correctly applied this Court's First Amendment jurisprudence, which permits restrictions upon the use of government funds so long as "employers remain free to use their own funds to advocate for or against unionization and are not required to accept neutrality as a condition for receipt of state grant and program funds." Pet. App. 25a.

The en banc court also concluded that AB 1889's grant and program provisions do not intrude on an area that is "arguably – but not definitely – prohibited or protected" by the NLRA in the manner prohibited by the *Garmon* doctrine. Pet. App. 25a (citation omitted). The en banc court recognized that, under AB 1889, a California state court "would determine only whether an employer used state grant or program funds to influence employees, not whether that attempt violated the NLRA." Pet. App. at 28a. The majority thus concluded that there is neither a sufficient identity of issues nor a risk that a state tribunal, while applying state law, could misinterpret federal law so as to warrant preemption. Pet. App. 28a-29a.

The en banc court also determined that AB 1889 would fall within the *Garmon* preemption exception for the regulation of interests "'deeply rooted in local feeling and responsibility. . . . '" Pet. App. 30a (*quoting Garmon*, 359 U.S. at 243-44). The en banc court reasoned that "a state's effort to ensure that those who accept its grant and program funds use them for the purpose for which they were given . . . is of at least as great a concern to the state as its power to regulate" in other areas held to fall within this exception. Pet. App. 31a (footnotes omitted).

Three dissenting judges would have held AB 1889 to be preempted under both the *Garmon* and *Machinists* doctrines on the ground that it "stifles employers from fully participating in organizing and exercising the rights that are explicitly granted to them by Congress under the NLRA." Pet. App. 36a. In reaching this conclusion, the dissenters interpreted AB 1889 as "co-opt[ing]" the payment received from the State for goods and services and "profit" realized under a contract. Pet. App. 36a. The majority rejected this interpretation, pointing out, in its discussion of the First Amendment, that the appeal involved a facial challenge only, and further, that the contract provisions of AB 1889 were not before the court. Pet. App. 34a, n. 22.

The majority further noted that "[t]he dissent also disregard[ed] the nature of state programs, which are run to serve public purposes and need not guarantee a profit to private companies." Pet. App. 35a, n. 23. The majority also observed that respondents had acknowledged that the law's restrictions

would *not* apply to employers' own funds, including, for example, "legitimately distributed corporate dividend[s]" reinvested in the corporate entity, which the majority recognized would be, "itself, the fruit of the receipt of state grant or program funds." Pet. App. 32a-33a, n. 20.

SUMMARY OF ARGUMENT

The Chamber of Commerce contends that AB 1889's grant and program provisions are facially unconstitutional because their restrictions on the use of state grant and program funds to assist, promote or deter union organizing are preempted by the NLRA under the *Machinists* and *Garmon* doctrines. The Chamber of Commerce, however, has failed to establish that no set of circumstances exists under which AB 1889 would be valid. This is the standard that is applicable to facial challenges.

AB 1889's grant and program provisions are not preempted under either the *Machinists* or *Garmon* preemption doctrines. The controlling inquiry under *Machinists* is whether AB 1889 is regulating in an area that Congress intended to be controlled by the free play of economic forces. AB 1889 does not regulate in such an area. AB 1889 was enacted to ensure that California does not subsidize an employer's efforts to assist or deter union organizing, in order to preserve California's neutrality in such matters. This is a legitimate governmental interest.

AB 1889 only restricts an employer's use of *state* funds to assist, promote or deter union organizing. Employers who receive state grant and program funds are free to engage in activities to support or oppose union organizing, provided they do so with non-state funds. AB 1889 also does not condition receipt of state grant or program funds on an employer remaining neutral on union organizing activities. AB 1889's restrictions on the use of state funds are thus nearly identical to other government funding restrictions that have been held to be consistent with the First Amendment. And, because AB 1889 does not regulate an employer's free speech rights, there is no reason to believe that California is intruding on an area Congress intended to be left to the free play of economic forces. A state's decision on how best to use its funds is not a matter that is left to the free play of market forces.

AB 1889 only restricts the use of state funds, over which California maintains a legitimate interest, and thus does not control the use of an employer's *own* funds in violation of the *Machinists* doctrine. To the extent that California disburses grant and program funds, it does so to advance public interest goals. In order to control costs and to preserve the integrity of the projects financed by state grant and program funds, California maintains a legitimate interest in those funds until such time as the grant recipient or program participant has provided the State with the service the State has funded, and in the manner required by the grant or program. California has a sovereign right to ensure that its taxpayers' grant

and program funds are not diverted from their intended purposes and, instead, used by the recipients to assist or deter union organizing. Moreover, AB 1889 does not restrict the use of any excess funds, including profit, that grant or program fund recipients may retain under the rules that are applicable to a specific grant or program.

The Chamber of Commerce has also failed to demonstrate that AB 1889's record-keeping and enforcement provisions would objectively chill employers from engaging in conduct to deter or support union organizing using their own funds. AB 1889's record-keeping provisions are flexible and reasonable. This Court has upheld far more burdensome requirements for recipients of government subsidies. Additionally, whether the record-keeping provisions are burdensome is a factual issue that is in dispute, and which remains unresolved in this facial challenge. Moreover, AB 1889's enforcement provisions are reasonable and measured.

AB 1889's grant and program provisions are also not preempted under the *Garmon* doctrine. The goal of the *Garmon* doctrine is to preserve the NLRB's jurisdiction. Thus, *Garmon* prohibits state regulation of conduct that is actually or arguably protected or prohibited by the NLRA. Even were the NLRA construed as affirmatively providing employers with a free speech right independent of the First Amendment, AB 1889 does not regulate speech and thus would not violate any such NLRA-guaranteed free speech right. AB 1889 also does not regulate an employer's *coercive* speech, conduct that is prohibited

by the NLRA and that falls within the NLRB's jurisdiction. The inquiry before a state court in an AB 1889 enforcement action would be restricted to whether state funds were used by the employer to assist or deter union organizing, not whether the speech in which the employer engaged was coercive. As such, AB 1889 does not intrude on the NLRB's jurisdiction in a manner prohibited by *Garmon*.

Finally, *Garmon* preemption may be avoided where the state statute at issue concerns an interest deeply rooted in local feeling and responsibility. AB 1889's grant and program provisions fall squarely within this recognized exception to *Garmon* preemption. AB 1889 advances California's right to control its public fisc in the same manner that Congress has done so, with respect to the federal fisc, in other statutes upheld by this Court. Requiring California to subsidize an employer's efforts to assist or deter union organizing would be a serious intrusion on that right. Congress has not authorized, through the NLRA, such a significant intrusion on California's sovereignty.

ARGUMENT

I.

AB 1889'S GRANT AND PROGRAM PROVISIONS ARE NOT PREEMPTED UNDER THE *MACHINISTS* DOCTRINE

The *Machinists* preemption doctrine is a form of field preemption that prohibits regulation in areas

that Congress, by implication, intended "'to be controlled by the free play of economic forces.'" *Boston Harbor*, 507 U.S. 218, 225 (*quoting Machinists*, 427 U.S. 132, 147). The "crucial inquiry" under *Machinists* is whether the state is curtailing or entirely prohibiting economic weapons of self-help that "Congress meant to be unregulable" and, thus, "would frustrate effective implementation of the [NLRA's] processes." *Machinists*, 427 U.S. at 147-48 (internal quotations and citations omitted). By prohibiting the regulation of weapons of self-help that employers, unions, or employees may utilize, the *Machinists* doctrine preserves Congress's "'intentional balance between the uncontrolled power of management and labor to further their respective interests.'" *Boston Harbor*, 507 U.S. at 226 (*quoting Golden State I*, 475 U.S. 608, 614 (1986)).

As explained below, because AB 1889's grant and program provisions neither restrict employers' use of their own funds nor condition receipt of state grant and program funds on employers' forgoing any rights to engage in speech regarding union organizing issues, California's statute neither regulates in an area that Congress intended to be left controlled by the free play of market forces nor curtails a weapon of self-help that Congress intended to be free from regulation. Accordingly, AB 1889 is not preempted by the NLRA under the *Machinists* preemption doctrine.

A. AB 1889's Grant and Program Provisions Do Not Regulate the Use of Employers' Own Funds Nor Condition Receipt of State Grant and Program Funds on Employer Neutrality

The Chamber of Commerce asserts that AB 1889's grant and program provisions are preempted by the NLRA under the *Machinists* doctrine because Congress intended to prohibit states from regulating non-coercive speech in which an employer may choose to engage using its own funds. Petitioners' Br., 20-22. Assuming the Chamber of Commerce is correct that non-coercive speech is an economic weapon of self-help that Congress intended to be left entirely unregulated, AB 1889 does not regulate employer speech. AB 1889 simply bars employers from using state funds to bankroll such speech.

Preliminarily, it is insufficient to simply characterize AB 1889 as "regulatory" in order to successfully establish that it is preempted. *See Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 758 (1985) (*Metropolitan Life*) (Massachusetts's mandated-benefit law, characterized as a "law which regulates insurance," held not preempted under *Machinists*, as applied to a plan negotiated pursuant to a collective bargaining agreement). Indeed, although this Court has observed that "in passing the NLRA, Congress largely displaced state regulation of industrial relations" (*Wisconsin Dept. of Indus., Labor and Human Relations v. Gould, Inc.*, 475 U.S. 282, 286 (1986)

(*Gould*)), the Court has also recognized that it "'cannot declare preempted all local regulation that touches or concerns in any way the complex interrelationships between employees, employers, and unions; obviously much of this is left to the States.'" *Metropolitan Life,* 471 U.S. at 757 (*quoting Motor Coach Employees v. Lockridge*, 403 U.S. 274, 289 (1971)).[3] Thus, in order to determine whether AB 1889 curtails an employer's right to self-help in the manner prohibited by *Machinists,* one must carefully ascertain exactly what conduct AB 1889 actually limits.

AB 1889 implements the State's decision not to subsidize, with state funds, employers' efforts to assist, promote or deter union organizing. Accordingly, the core provisions of AB 1889 restrict *state* grant and program funds from being used to pay for expenses a grant recipient or program participant voluntarily incurs when it elects to influence its employees on whether or not to join a union. Cal. Gov't Code § 16645.2(a); Cal. Gov't Code § 16645.7(a). AB 1889 does not restrict an employer's right to

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[3] Accordingly, to the extent that the Chamber of Commerce and its supporting amici imply that the critical inquiry in this case is whether California is acting as a "market participant" or as a "regulator," they are incorrect. The question of whether California, through AB 1889, is acting as a market participant for purposes of that recognized exception to *Machinists* preemption is an issue distinct from whether California's statute, whether or not regulatory, is preempted by the NLRA. *See Metropolitan Life,* 471 U.S. at 758 and *Boston Harbor*, 507 U.S. at 224.

engage in any free speech in which it may wish to engage, including lobbying its employees about the employer's views regarding a union organizing campaign or influencing its employees about whether or not they should join a union. AB 1889 only requires that the employer use its own funds to pay for the expenses incurred in engaging in such activities.

AB 1889 also does not condition receipt of state funds on an employer taking a position of neutrality with respect to union organizing. To the contrary, an employer is free to accept state grant and program funds and, simultaneously, incur unlimited expenses to influence its employees about whether or not to join a union, so long as it pays for those expenses with non-state funds. Thus, the Chamber of Commerce's characterization of AB 1889 as "foist[ing] its own labor policy of employer silence on union organizing. . . . " is inaccurate. Petitioners' Br., 16. Because employers retain the right to use non-state funds to engage in union lobbying activities, notwithstanding their receipt of state grant and program funds, no labor policy with which they disagree is being "foisted" upon them.

Further, contrary to the Chamber of Commerce's contention, there is a fundamental and sound distinction between a *restriction* on the *use of state funds* and a *denial of state funds* to those who engage in speech with their *own* funds. *See* Petitioners' Br., 41. First, as this Court has long recognized in the First Amendment context, within broad limits, the government's refusal to subsidize an activity does not

constitute regulation of that activity. *See Rust v. Sullivan*, 500 U.S. 173, 193 ("[a] legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right. . . . "); *Regan v. Taxation with Representation*, 461 U.S. 540, 546 (1983) ("Congress has not infringed any *First Amendment* rights or regulated any *First Amendment* activity. Congress has simply chosen not to pay for [plaintiff's] lobbying."); *see also United States v. American Library Association*, 539 U.S. 194, 212 (2003) (plurality opinion) ("[a] refusal to fund protected activity, without more, cannot be equated with the imposition of a 'penalty' on that activity." (citations omitted)).

Second, and more fundamentally, as the en banc court recognized, it is "implausible" that Congress would have intended the use of state grant and program funds to be left to the free play of economic forces, "when the state's choices of how to spend its funds are by definition not controlled by the free play of economic forces." Pet. App. 16a-17a (*citing Boston Harbor*, 507 U.S. at 225-26). The NLRA does not grant employers a right to subsidize their speech with state funds. To the contrary, the *Machinists* preemption doctrine only preserves the use of "weapons of self-help" that the employer, employee or union may wish to utilize. *See Golden State I*, 475 U.S. at 614-15. It cannot be presumed that Congress intended the "weapons of self-help" to include the use of state subsidies. *Cf. Lyng v. Int'l Union, UAW*, 485 U.S. 360, 371 (1988) ("[i]t was no part of the purposes of the Food Stamp Act to establish a program that would

serve as a weapon in labor disputes."). The fact that Congress itself has enacted similar prohibitions on the use of federal monies to assist or deter union organizing with respect to federal programs, such as the federal Head Start Programs Act (42 U.S.C. § 9839(e) (2008)), strongly suggests otherwise.

There is no dispute that the NLRA envisions free and robust speech by employees and employers on union issues. *Linn v. United Plant Guard Workers of Am.*, 383 U.S. 53, 62 (1966). However, nothing in the NLRA or its legislative history suggests that Congress intended to require states to further that goal by subsidizing the speech of employers who may wish to engage in that debate. Nor are state subsidies an economic weapon of self-help to which employers are entitled under the NLRA.

Finally, contrary to the assertion of the Chamber of Commerce and its amici, AB 1889 is not preempted by the *Machinists* doctrine on the ground that California is invoking its spending power in the manner rejected by the Court in *Gould*, 475 U.S. 282. *See* Petitioners' Br., 25-26. Consideration of the limitations of a state's spending power arises when a state is asserting an *exception* to engage in conduct that would otherwise be preempted by the NLRA. *See Gould*, 475 U.S. at 288-89. A state's statutory scheme does not "escape[] pre-emption because it is an exercise of the State's spending power rather than its regulatory power." *Id.* at 287. But AB 1889 does not

intrude on an area that Congress left to be unregulated. AB 1889 only places restrictions on the use of the State's own funds, and therefore is not preempted by the NLRA under the *Machinists* doctrine. That AB 1889 is an exercise of California's spending power does not somehow transform the State's otherwise legitimate restriction on the use of its own funds into conduct that is preempted by the NLRA. To conclude otherwise would constitute an unprecedented intrusion on a state's legitimate exercise of its spending power.

B. AB 1889 Restricts The Use of Funds Over Which California Maintains a Sovereign Interest

Even though AB 1889 restricts only the use of "*state*" funds, the United States asserts that "employers are not free under A.B. 1889 to spend their 'own funds' as they wish. . . ." United States' Br., 17. Contending that "A.B. 1889's limitations on employer speech are not limited to state grants, but continue to apply to 'state' funds even after those funds have been paid by the State to program participants in exchange for services rendered," the United States reasons that AB 1889's restrictions on the use of state program funds therefore "extend beyond any arguably legitimate proprietary interest." *Id.* Therefore, in the United States' view, AB 1889 regulates an employer's own funds, an activity that is preempted by the *Machinists* doctrine. *Id.* Similar reasoning is offered by the Chamber of Commerce. *See* Petitioners' Br., 41

(referring to restrictions on "state-derived" funds). The position advanced by the Chamber of Commerce and the United States is incorrect.

First, the district court addressed the limited issue of whether, *as a facial matter*, AB 1889's grant and program provisions are preempted by the NLRA. *See* J.A. 349 (district court's partial judgment declaring California Government Code sections 16645.2 and 16645.7 "invalid as applied to employers covered by the [NLRA]" and enjoining respondents from enforcing those provisions). The district court did not evaluate AB 1889's grant or program provisions as applied to any particular state grant or program, nor did it make any factual findings as to how any grant or program operates.

Facial invalidation of a statute is "'manifestly, strong medicine' that 'has been employed by the Court sparingly and only as a last resort.'" *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 580 (1998) (*quoting Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973)). Accordingly, a party mounting a facial challenge "must establish that no set of circumstances exists under which the [law] would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987); *see also California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 577, 580 (1987) (to succeed in a facial preemption challenge, plaintiffs must show "there is no possible set of conditions the Coastal Commission could place on its permit that would not conflict with federal law. . . . ").

Accordingly, so long as AB 1889's grant and program provisions can validly be applied in some circumstances, a facial challenge must be rejected. And any "as applied" challenges must be raised first in the trial court, to allow the State the opportunity to respond to them.[4]

Second, the Chamber of Commerce and the United States misinterpret the AB 1889 provisions at issue. As explained below, both the grant and program fund provisions would be applied only to funds in which the State has a legitimate interest, not to excess funds and profits.

1. The State Maintains a Sovereign Interest In Grant Funds

California disburses grant funds to advance a vast array of public interest goals. *See, e.g.*, Cal. Health & Safety Code § 125290.10-125292.10 (West 2008) (the California Stem Cell Research and Cures Act, providing grant and loan money for, inter alia, stem cell research); Cal. Gov't Code § 15438.6 (West 2008) (grants for primary health care clinics for capital improvements); and Cal. Penal Code § 13837 (West 2008) (grants for child sexual exploitation and

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[4] Because AB 1889 contains an express severability clause, Cal. Gov't Code § 16649, even if a particular application of AB 1889 were held unconstitutional, only narrowly tailored injunctive and declaratory relief would be appropriate. *See Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320, 331 (2006).

child sexual abuse victim counseling centers). Like other government grants, California grant monies are subsidies disbursed from public funds. *See Rust v. Sullivan*, 500 U.S. 173, 199; *see also* Black's Law Dictionary, 1469 (8th ed. 2004), defining a subsidy as a "grant, usu[ally] made by the government, to any enterprise whose promotion is considered to be in the public interest."

When disbursing grant funds, the State has an obvious and strong interest in controlling costs and ensuring that state funds are used for those activities that the State believes will most effectively further the specific grant's purpose. This interest is substantial because the achievement of a grant goal is often difficult to measure. For example, with respect to California's stem cell research grants, to the extent that California allows those grant funds to be diverted from their intended purpose and, instead, used by the grant recipient to pay for activities to influence its employees about whether to join a union, less money would be available for the medical research that the State intends to fund. While the grant recipient might still be able to provide the State with some level of research to comply with the grant's terms, the State, in reality, would not receive the level of research services that it intended to fund and for which it paid.

Apparently recognizing the State's continuing interest in state grant funds, the Chamber of Commerce proffers the argument that the State's fiscal interest in those funds "is more than served by the standard requirement, in California and elsewhere, that public funds may go only toward grant-related purposes and expenses" or by either generically agreeing to fund "all employee relations" expenditures or none at all. Petitioners' Br., 35.

The Chamber of Commerce's suggestion is unworkable and would unnecessarily restrict the State's ability to ensure that grant funds are in fact applied only to the specific purposes for which they were awarded. It is difficult to imagine a scenario in which it would be practical to exclude all employee-related administrative costs from the grant program. Some such costs may be deemed necessary to the achievement of a grant's purpose and would be considered appropriate overhead, and other costs might not. For example, overhead costs associated with determining employee salaries may be deemed unavoidable expenses the grant recipient will incur in order to operate its business and to carry out the work funded by the grant. On the other hand, costs associated with planning an employee retreat may not. Because the parties involved in the specific grant may disagree on the efficacy of a specific overhead expense, clarity as to which specific overhead costs are allowable is often necessary.

It is thus not uncommon for the government to closely regulate grant-funded projects and to

explicitly restrict expenditures of certain overhead and administrative costs to which grant monies may be applied. *See e.g.*, J.A. 290-97 (Federal OMB Circular No. A-122 (Revised), establishing "principles for determining costs of grants, contracts and other agreements with non-profit organizations" and listing, at J.A. 293-95, fifty-six "Selected Items of Cost," including costs for public relations, communications, labor relations and lobbying); *see also* California Institute for Regenerative Medicine's ("CIRM") Grants Administration Policy for Academic and Non-Profit Institutions, pp. 27-36 ["Payment and Use of Funds" relating to stem cell research grants], *available at* http://www.cirm.ca.gov/reg/pdf/reg100500_policy.pdf (last visited February 6, 2008); *see* Cal. Code Regs. tit. 17, § 100500(b) (2008) (incorporating by reference CIRM policy).

That the government has a substantial interest in overseeing government grant funds is generally understood and is well accepted. *Cf. Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 675 (1970) ("Obviously a direct money subsidy would be a relationship pregnant with involvement and, as with most governmental grant programs, could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards. . . . "). Moreover, the legitimate interest that the government retains in grant funds is implicitly recognized in this Court's First Amendment jurisprudence. *See, e.g.*, *Rust v. Sullivan*, 500 U.S. at 199, n. 5 ("The regulations are limited to Title X funds; the

recipient remains free to use private, non-Title X funds to finance abortion-related activities."). Indeed, recognizing the strong interest that states retain in grant funds they disburse, the Second Circuit, the only other court to evaluate a state law similar to AB 1889 as against a preemption challenge, correctly concluded that New York's law restricting the use of funds for union organizing-related purposes as applied to state grants is not preempted by the NLRA. *Healthcare Ass'n of N.Y. State, Inc. v. Pataki*, 471 F.3d 87, 102-03, 105, 107-08 (2d Cir. 2006) (*Healthcare Ass'n*); *see id.* at 102-03 (observing that "[to] the extent that [the New York law] applies to grant monies (which the employers cannot contend is their own), the associations do not argue that the State cannot specify in advance what a grant may and may not be used for.").

In short, because California maintains a sovereign interest in its grant funds, AB 1889's grant provision only regulates "state funds" and does not regulate an employer's use of its own funds in violation of *Machinists*. And, even if there may be instances in which that were not the case due to the specific requirements of a particular grant, such theoretical possibilities are insufficient to satisfy the Chamber of Commerce's burden in this facial challenge.

2. The State Maintains a Sovereign Interest In Program Funds

Nor can the Chamber of Commerce demonstrate that California lacks a continuing interest in state program funds after they are disbursed.

California disburses public funds in return for the delivery of social services to program beneficiaries in what California terms state "programs." The goals of state programs are similar to those of traditional grants and encompass a broad variety of public services, including child care and development (Cal. Educ. Code §§ 8240-8244 (West 2008); Cal. Code Regs. tit. 5, §§ 17906-18308 (2008)); job training to maintain high-performance workplaces in California (Cal. Unemp. Ins. Code §§ 10200-10217 (West 2008)); and delivery of medical care for the needy through California's Medicaid program, known as Medi-Cal (Cal. Welf. & Inst. Code §§ 14000-14199.3 (West 2008)).

As with grant funds, the State obviously has a strong interest in controlling program costs. And, as is the case with grants, the achievement of program goals, in particular as to ensuring the highest quality in the delivery of services, is often difficult to measure objectively. Furthermore, government programs, like grants, are substantially different from simple, straightforward commercial transactions between private parties seeking only commercial benefits. Rather, program participants are usually providing critical public services to California residents in the context of a comprehensive and detailed regulatory scheme and on a continuous basis over a long period of time. *See* Cal. Welf. & Inst. Code §§ 14000-14199.3 (West 2008); Cal. Code Regs. tit. 22, §§ 50000-59999 (2008). Because of these unique characteristics of state programs, the State maintains a legitimate

interest in program funds until such time as the program participant has provided the State with the service the State has funded in the manner required by the program.

The Chamber of Commerce, however, suggests that because program funds may in some instances be paid after program services are rendered, such funds are no longer state funds once they are disbursed. Thus, according to the Chamber of Commerce, AB 1889's program provisions regulate the program participant's *own funds,* and thus, in contravention of the *Machinists* doctrine, they intrude on an area Congress intended to leave unregulated.

This argument, particularly in the context of a facial challenge, is without merit. The Chamber of Commerce ignores the fact that not all programs are operated in the same manner. For example, in an effort to provide cash flow to program participants, California operates certain programs by paying *advances* or *interim* payments to program participants based on projected estimated allowable expenses. In those circumstances, the State calculates a cost settlement at the end of the fiscal year and recovers any overpayments that the State determines have been made.

One example is California's child care and child development program, in which California *advances* funds to program participants, or "contractors," before services are rendered. *See* Cal. Educ. Code § 8268 (West 2008); *see* Cal. Code Regs. tit. 5, §§ 18038,

18064(c) (2008). The program participants report expenditures on an accrual basis and must submit an annual financial and compliance audit. Cal. Code Regs. tit. 5, §§ 18063, 18071 (2008). The State reviews the audit to determine the contractor's "net reimbursement program costs." Cal. Code Regs. tit. 5, § 18072(a); *see* Cal. Code Regs. tit. 5, §§ 18013(p), 18034, 18035 (2008). After the State analyzes the audit, a final settlement is calculated and the California Department of Education recovers advanced funds to the extent the Department determines that an overpayment has been made. Cal. Code Regs. tit. 5, §§ 18072, 18038 (2008).

Because California makes advance payments to the child care provider based on *estimated* allowable expenses, it is unknown whether the State has made overpayments to the provider until settlement is calculated at the end of the year. The State thus retains a legitimate interest in the child care funds that have been disbursed until final payment for services rendered is actually determined. Indeed, until such final payment has been determined and any overpayments have been returned to the State, the funds remain "state funds." And, if the child care funds are used to pay for lobbying related to union organizing prior to a final reconciliation, those activities are, in fact, being financed and subsidized with "state funds."

The same is true with respect to one type of payment method that is used in California's Medi-Cal program. This method is used to reimburse hospitals

that have not negotiated contracts for inpatient services with the State ("non-contract" hospitals). In this reimbursement model, the State makes *interim* payments to each hospital based on the historical, allowable cost-to-charge ratio of the hospital, in order to furnish non-contract hospitals with cash flow sufficient to provide services to Medi-Cal patients throughout each hospital's fiscal year. Cal. Code Regs. tit. 22, § 51536(c)(2) (2008). These interim payments are paid as services are rendered and bills are submitted throughout the fiscal year. *See Redding Medical Center v. Bonta*, 89 Cal. Rptr. 2d 348, 349-50 (Cal. Ct. App. 1999).

At the end of a hospital's fiscal year, the hospital submits a Medi-Cal cost report that is then audited by the State. Cal. Welf. & Inst. Code § 14170 (West 2008); 42 C.F.R. §§ 413.20(b), 413.24(f) (2008). The State calculates a final settlement based on the audited cost report, and the final settlement is reconciled with the interim payments to determine whether there have been any underpayments or overpayments made to the provider. Cal. Code Regs. tit. 22, § 51536 (2008). If an overpayment has been made, it can be recovered by the State. Cal. Code Regs. tit. 22, § 51536(d) (2008). If a non-contract hospital is dissatisfied with the final settlement determination, it may file an administrative appeal. *See* Cal. Welf. & Inst. Code § 14171 (West 2008).

As is the case with the child care program discussed above, there is no question that California retains a substantial interest in state program funds that are disbursed to non-contract hospitals until

final payment for services rendered is actually determined. The existence of some circumstances in which California unquestionably has an interest in the use of its program funds requires that the Chamber of Commerce's facial challenge be rejected. *See United States v. Salerno,* 481 U.S. at 745.

While the application of AB 1889 to specific state programs is not before the Court, the State also notes its disagreement with any claim the Chamber of Commerce may make that California has no interest in funds disbursed through state programs when payment in such a program is made after services are rendered and no interim payments are made. Such a contention would be incorrect. The State has an interest in these disbursed funds until the program participants that are paid after services are rendered, such as skilled nursing facilities participating in Medi-Cal, have complied with all program requirements in rendering services for which the program participant has billed the State.

For example, when a provider renders services to an eligible beneficiary under California's Medi-Cal program, the provider is required to comply with the various program requirements as a condition of being entitled to reimbursement received from the program. Among other requirements, Medi-Cal providers are prohibited from rendering services which are "below or less than the standard of acceptable quality." Cal. Code Regs. tit. 22, § 51472 (2008). And the providers are prohibited from submitting a claim for reimbursement for, among other items, services "clearly in excess of accepted standards of practice," "in any

amount greater or higher than the usual fee charged by the provider to the general public for the same service," or "for which the provider has received and retained payment." Cal. Code Regs. tit. 22, §§ 51470(d), 51473, 51480(a) (2008). In addition, Medi-Cal providers are required to maintain records "as are necessary to fully disclose the type and extent of services provided to a Medi-Cal beneficiary." Cal. Code Regs. tit. 22, § 51476(a) (2008). With respect to Medi-Cal providers providing institutional care, such records must include "records of receipts and disbursements of personal funds of beneficiaries being held in trust by the provider," "employment records including shifts, schedules and payroll records of employees," and "book records of receipts and disbursements by the provider." Cal. Code Regs. tit. 22, § 51476(b) (2008).

California retains the right to audit Medi-Cal health care providers to assure that these and other program requirements are met, and may recover overpayments resulting from such audits. Cal. Welf. & Inst. Code §§ 14170; 14171.6-14177 (West 2008). Because the State has the right to recover overpayments, it retains a governmental interest in the funds it has disbursed.

If a program participant has not fully met the program's requirements because the participant has instead used program funds for other purposes, the integrity of the program is undermined. This is true even when the State tenders payment to the program participant based on a per diem rate. Accordingly, the

State retains a legitimate interest in funds delivered to program providers for services rendered. And since the participant is being reimbursed based on its satisfaction of all program requirements, the participant can have no complaint when it is asked to keep records showing that any funds used to assist or deter union organizing are not state funds that have been diverted from their intended purposes.

3. AB 1889 Does Not Apply to Excess Funds Over Which the State Has No Legitimate Interest

Next, the Chamber of Commerce argues that AB 1889 is preempted because it regulates funds that have been "fairly received in exchange for providing [a] public service." Petitioners' Br., 36. Because program participants incur costs to provide the services the State funds, the Chamber of Commerce must not be referring to that portion of payments which merely covers those costs. The Chamber of Commerce therefore appears to suggest that AB 1889 regulates the use of profits or, for that matter, any excess funds that a program participant may have earned after paying the allowable expenses incurred in satisfying the grant or program requirements.

The Chamber of Commerce's argument fails for two reasons. First, as discussed above, this writ proceeding presents a facial challenge only. The en banc court thus correctly recognized that AB 1889's purported application to profit was not before it. Pet.

App. 34a, 35a, n. 23. Moreover, the Chamber of Commerce has not established that all, or even most, grant recipients and program participants realize a profit from state grants and programs. In fact, amicus curiae American Hospital Association (AHA) suggests otherwise. Amicus Br. of AHA, 17. Nor has the State of California or the California state courts applied AB 1889's restrictions to any profit that a state grant or program may allow. Thus, this theoretical application of AB 1889 is not at issue here. As this Court has recognized, "[f]acial challenges are best when infrequent," and laws should not be invalidated by "'reference to hypothetical cases.'" *Sabri v. United States*, 541 U.S. 600, 608 (2004) (*quoting United States v. Raines,* 362 U.S. 17, 22 (1960)). Accordingly, in the event that AB 1889's grant or program provisions are actually applied to profit or excess funds, that issue should be litigated in an as-applied challenge, and not within the parameters of this facial challenge.

Second, if there are some grants or programs in which profits are realized, the Chamber of Commerce misinterprets AB 1889's grant and program provisions to restrict use of such profits. These provisions do *not* restrict the use of excess funds, including profit, provided that the grant or program does not require the return of such excess funds to the State. A contrary construction would place the constitutionality of AB 1889's grant and program provisions in doubt, contrary to the basic tenet of statutory construction that a statute should be interpreted to favor

constitutionality, if such an interpretation is reasonable and readily apparent. *Frisby v. Schultz*, 487 U.S. 474, 483 (1988) (interpretation of local ordinance supported by representations of government's counsel adopted to avoid constitutional difficulties); *but see Stenberg v. Carhart*, 530 U.S. 914, 943-45 (2000) (state's interpretation of partial birth abortion statute not reasonable or readily apparent in view of statute's terms and underlying legislative history). Were the California courts given an opportunity to construe AB 1889, they too would follow the canon of statutory construction that statutes should be construed to avoid constitutional doubts. *See People v. Davenport*, 710 P.2d 861, 870 (Cal. 1985).

That excess funds are not within the purview of AB 1889 is consistent with a reasonable interpretation of that legislation and is consistent with the legislature's intent in enacting AB 1889. State funds are generally defined in AB 1889 as "any money drawn from the State Treasury or any special or trust fund of the state." Cal. Gov't Code § 16645(d)(1). Neither this definition, nor the other provisions of AB 1889, expressly delineate when state program or grant funds lose their character as state funds. However, AB 1889's uncodified preamble makes it clear that in enacting AB 1889, the California legislature intended to prohibit *"subsidizing"* an employer's

efforts to assist or deter union organizing.[5] This reference to "subsidizing" necessarily restricts AB 1889's application to funds over which California retains a governmental interest. If an employer is using its own funds to assist or deter union organizing, then California is not subsidizing that conduct. And because the State has no governmental interest with respect to an employer's profit or excess funds that may be allowable under a particular program, an employer's use of such funds to assist or deter union organizing would not constitute a *state subsidy* for such activities. Because the stated goal of AB 1889 is to prohibit subsidizing employer conduct with state funds, excess funds would necessarily fall outside AB 1889's purview.[6]

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[5] AB 1889's preamble states:

> [i]t is the policy of the *state* not to interfere with an employee's choice about whether to join or to be represented by a labor union. For this reason, the *state should not subsidize efforts by an employer* to assist, promote, or deter union organizing. It is the intent of the Legislature in enacting this act to prohibit an employer from using *state* funds and facilities for the purpose of influencing employees to support or oppose unionization and to prohibit an employer from seeking to influence employees to support or oppose unionization while those employees are performing work on a state contract. 2000 Cal. Stat. ch. 872, § 1 (emphasis added).

[6] Excess funds, of course, would not include overpayments that may be required to be returned to the State under the terms of the particular grant or program. *See* Cal. Code Regs. tit. 5, § 18072 (2008) (child care program).

The reasonableness of this interpretation of AB 1889 is evident when the interpretation applied to the federal Byrd Amendment, 31 U.S.C. § 1352, is considered. The Byrd Amendment restricts the use of government funds for certain lobbying activities and is structured very similarly to AB 1889. Specifically, the Byrd Amendment provides:

> *None of the funds appropriated by any Act may be expended by the recipient of a Federal contract, grant, loan, or cooperative agreement to pay any person for influencing* or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with . . . [t]he awarding of any Federal contract . . . [t]he making of any Federal grant. . . . [or] any Federal loan. . . . [t]he entering into of any cooperative agreement . . . [or] [t]he extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

31 U.S.C. § 1352(a)(1) & (a)(2) (emphasis added).

Significantly, in 1990, the federal Office of Management and Budget clarified its interim final guidelines regarding the Byrd Amendment by explaining that the Amendment did not govern profit. 55 Fed. Reg. 24540-01, 24542 (June 15, 1990) ("(2) Profits and fees earned under Federal contracts (see FAR subpart

15.9) are not considered appropriated funds. Profits, and fees that constitute profits, earned under Federal grants, loans, and cooperative agreements are not considered appropriated funds.").

As explained above, a similar interpretation of AB 1889 is reasonable and in accord with the California legislature's stated purpose for enacting AB 1889. Because this interpretation of AB 1889's grant and program provisions avoids any constitutional doubts concerning the state law, the interpretation should be adopted.

C. Because AB 1889's Grant and Program Provisions Further The State's Legitimate Policy of Not Subsidizing Employer Union Organizing-Related Activities, They Do Not Violate the *Machinists* Doctrine

The Chamber of Commerce and its amici, referencing only portions of AB 1889's uncodified preamble, describe AB 1889 as reflecting "California's explicit policy judgment that *employer* speech for or against unionization 'interfere[s] with an employee's choice about whether to join or be represented by a labor union." United States' Br., 14 (emphasis added) (*quoting* AB 1889's uncodified preamble, 2000 Cal. Stat. ch. 872, § 1). Based on a similar characterization of AB 1889, the Chamber of Commerce suggests that AB 1889's grant and programs provisions tilt the balance of power toward unions and thus effectively

regulate conduct that is preempted by the NLRA under *Machinists*. Petitioners' Br., 30-31. This characterization of AB 1889 is not correct.

AB 1889 does not reflect a legislative judgment that *employer* speech about union organizing is contrary to public policy or otherwise interferes with the rights of employees in labor matters. Rather, the plain and complete language of AB 1889's uncodified preamble makes clear that the California legislature found that state *subsidizing* of employer speech in this context, with state grant and program funds, is the conduct the legislature believed may interfere with an employee's choice about whether to join a union. The government's desire not to subsidize union-related expenditures is a recognized legitimate governmental concern. *See Lyng v. Int'l Union, UAW*, 485 U.S. 360, 371 ("[w]e have little trouble in concluding that [the federal Food Stamp Act, which declines initial and increased food stamp assistance to striking workers] is rationally related to the legitimate governmental objective of avoiding undue favoritism to one side or the other in private labor disputes.").

Further, contrary to the Chamber of Commerce's assertion, AB 1889 does not favor unions over employers. AB 1889 does not provide an exemption for labor unions. Rather, the statute does apply to unions that seek to influence the decision of their employees or those of their subcontractors regarding whether to join a union. *See* Cal. Gov't Code § 16645(a) (defining "assist, promote, or deter union organizing"). More importantly, there is nothing in the record that

suggests, let alone demonstrates, that unions receive any state grant and program funds that they could use to assist or deter union organizing.

The Chamber of Commerce also incorrectly contends that the State's interest in enacting AB 1889 is not legitimate because it failed to restrict other potential improper uses of program funds. As has been recognized in the First Amendment and equal protection contexts, the government is well within its discretion to legislate in a narrow manner to remedy only the perceived problem before it. *See Davenport v. Washington*, 127 S. Ct. 2372, 2381 (2007); *FCC v. Beach Communications*, 508 U.S. 307, 316 (1993); *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488-89 (1955).

Nor, as asserted by the Chamber of Commerce, does Government Code section 16647, which clarifies AB 1889's limited scope, undermine the statute's neutrality. Cal. Gov't Code § 16647.[7] First, AB 1889,

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[7] Specifically, Section 16647 provides that:

> This chapter does not apply to an activity performed, or to an expense incurred, in connection with any of the following: (a) Addressing a grievance or negotiating or administering a collective bargaining agreement[;] (b) Allowing a labor organization or its representatives access to the employer's facilities or property[;] (c) Performing an activity required by federal or state law or by a collective bargaining agreement [or] (d) Negotiating, entering into, or carrying out a voluntary recognition agreement with a labor organization. Cal. Gov't Code § 16647.

by its plain terms, only restricts the use of state funds to "assist, promote, or deter union organizing." *See* Cal. Gov't Code § 16645.7(a). AB 1889 defines the phrase, "assist, promote, or deter union organizing" to mean: "any attempt by an employer to influence the decisions of its employees in this state or those of its subcontractors regarding either of the following: (1) Whether to support or oppose a labor organization that represents or seeks to represent those employees[, and] (2) Whether to become a member of any labor organization." Cal. Gov't Code § 16645(a). None of the activities enumerated in Government Code section 16647 fall within the above definition, and thus they would not be governed by AB 1889, even if they were not listed in Section 16647.

Second, several of the activities set forth in Government Code section 16647, specifically, "[a]ddressing a grievance," "negotiating or administering a collective bargaining agreement," and "[p]erforming an activity required by federal or state law or by a collective bargaining agreement" (Cal. Gov't Code § 16647(a), (c)), are activities that an employer may not be able to realistically and in some instances, legally, avoid when providing the services for which the State has contracted. As such, the California legislature's clarification that those activities are outside AB 1889's scope is reasonable.

In particular, the legitimacy of the exception for collective bargaining activities is underscored by the fact that the federal government has made similar distinctions in its Medicare program. For purposes of

that program, the federal government has determined that costs incurred for collective bargaining are reimbursable. J.A. 271 (Provider Reimbursement Manual, Part 1 § 2180.2 [¶ 5999Z-56]). Such costs are reimbursable because "[c]ontract negotiations and any procedures which flow from enforcement of contract terms, whether in a collective or individual setting, are necessary to maintain the continued operation of the provider, and, thus, are a precondition for the delivery of health services." *Id.* But significantly, the federal government, for purposes of Medicare, disallows costs that are "directly related to influencing employees with respect to unionization," because they "are not related to patient care." J.A. 266-67. Such distinctions are equally valid with respect to AB 1889.

Further, while AB 1889 permits the employer to use state funds when "[a]llowing a labor organization or its representatives access to the employer's facilities or property" (Cal. Gov't Code § 16647(b)), that provision neither requires nor encourages employers to agree to allow the labor union on its premises. Nothing in AB 1889 undermines an employer's right to refuse to allow a union to enter its premises. *See Lechmere, Inc. v. NLRB*, 502 U.S. 527, 538-41 (1992).

The same is true of AB 1889's provision that exempts, as outside the scope of AB 1889, activities involved in "[n]egotiating, entering into, or carrying out a voluntary recognition agreement with a labor organization." Cal. Gov't Code § 16647(d). AB 1889 neither requires nor encourages the employer to

negotiate such an agreement. The decision whether to engage in that activity is left entirely to the employer's discretion. Thus, contrary to the assertion of amici curiae The National Right to Work Legal Defense Foundation, Inc., et al., nothing in AB 1889 "induces employers to capitulate to union demands for neutrality card check agreements." Amici Br. of Nat'l Right to Work, 11 (citation omitted). Moreover, if the employer does wish to pursue a recognition agreement, AB 1889's restriction that it not use state funds to influence its employees about whether to join a union still applies. As such, the exception is consistent with the State's goal of not subsidizing union-lobbying activities, in order to preserve its neutrality.

Nor can the Chamber of Commerce demonstrate that AB 1889 is not neutral by asserting that employers would rarely use state funds to *assist* union organizing. Some employers do engage in activities to encourage their employees to join a union. For example, an employer may encourage employees to join a union that the employer prefers to another union. *See Davis Supermarkets, Inc. v. NLRB*, 2 F.3d 1162, 1176 (D.C. Cir. 1993), *Schlabach Coal Co. v. NLRB*, 611 F.2d 1161, 1161 (6th Cir. 1979); *District 65, Distributive Workers of America v. NLRB*, 593 F.2d 1155, 1159 (D.C. Cir. 1978).

And even were the Chamber of Commerce's contention accurate, as Judge Fisher aptly explained when this matter was before the Ninth Circuit on its first rehearing,

> The majority's extensive arguments as to the "real" purpose of AB 1889 are beside the point. Neutrality means not taking sides. Even if the majority is right that California is effectively preventing employers from using state funds to advocate *against* unionization only, California is still remaining neutral – and it is simply irrelevant whether the money would otherwise be spent to support unionization, oppose it, or in some combination.

Pet. App. 104a, n. 14 (Fisher, J., dissenting).

Finally, the Chamber of Commerce cannot successfully demonstrate that AB 1889 is preempted under *Machinists* based on the views of the sponsors of the legislation or of those who voted for it. The 12-member en banc court below properly rejected such an approach, observing that, "'[f]ederal preemption doctrine evaluates what legislation does, not why legislators voted for it or what political coalition led to its enactment.'" Pet. App. 34a, n. 21 (emphasis omitted) (*quoting Northern Ill. Chapter of Associated Builders & Contractors v. Lavin*, 431 F.3d 1004, 1007 (7th Cir. 2005)).

Accordingly, because AB 1889's grant and program provisions set forth neutral restrictions on the use of state funds, they do not intrude upon an area that Congress intended to be left unregulated.

D. The Chamber of Commerce Has Not Demonstrated, As a Facial Matter, That AB 1889's Record-Keeping and Enforcement Provisions Are So Unduly Burdensome as to Render the Statute's Grant and Program Provisions Preempted Under *Machinists*

The Chamber of Commerce suggests that AB 1889's record-keeping and enforcement provisions are so onerous that they effectively chill or regulate the manner in which an employer can spend its own funds for union organizing activities. *See* Petitioners' Br., 44-51. The Chamber of Commerce's contention is not supported by either AB 1889's plain language or by the record that it established below in this facial challenge.

AB 1889 requires employers who receive grant funds or program funds in excess of $10,000 in a calendar year, and who make expenditures to assist or deter union organizing, to "maintain records sufficient to show that state funds have not been used" for those purposes, and to provide those records to the Attorney General upon request. Cal. Gov't Code §§ 16645.2(c); 16645.7(c). Though AB 1889 assumes state funds are spent on such expenditures, on a pro rata basis, if the employer commingles state and other funds, Cal. Gov't Code § 16646(b), AB 1889 expressly provides that "[n]othing in [AB 1889] requires employers to maintain records in any particular form." Cal. Gov't Code § 16648.

The record does not support the Chamber of Commerce's suggestion that meeting these requirements is unduly difficult and requires the adoption of separate accounting systems or the maintaining of voluminous records. In the summary judgment proceedings below, the burden allegedly caused by AB 1889's record-keeping provisions was a disputed fact. *See* J.A. 71, Docket Entry 103 (Statement of Genuine Issues by Defendants in Opposition to Plaintiffs' Motion for Summary Judgment). On the one hand, the Chamber of Commerce submitted declarations alleging that it would be burdensome to comply with AB 1889's record-keeping provisions. J.A. 129, 135-36, 155, 158-59, 160-61, 163, 165-68. Contrary evidence, however, was presented. Specifically, Respondents and Intervenors, American Federation of Labor and Congress of Industrial Organizations and the California Labor Federation, submitted a declaration from a certified public accountant and partner in a national accounting firm that explained that AB 1889's record-keeping and accounting requirements "are similar to requirements imposed in other contexts, particularly for federal grant recipients" and that AB 1889's accounting and record-keeping requirements "appear to be significantly less burdensome" than complying with standard federal grant restrictions. J.A. 280-83, ¶¶ 6, 8. Significantly, the district court made no findings on this issue. Pet. App. 140a-149a.

Because the Chamber of Commerce is the party that sought and obtained summary judgment below,

all disputed facts must be resolved against it. *See Cantor v. Detroit Edison Co.*, 428 U.S. 579, 582 (1976). The existence of this disputed fact concerning AB 1889's record-keeping provisions renders it impossible for the Chamber of Commerce to establish, as a facial matter, that AB 1889's record-keeping provisions are so unduly burdensome as to effectively regulate the use of an employer's own funds. This is a classic example of a facial challenge "carr[ying] too much promise of premature interpretatio[n] of statutes on the basis of factually barebones records." *Sabri v. United States*, 541 U.S. 600, 609 (citations omitted).

The Chamber of Commerce nonetheless suggests that AB 1889's record-keeping requirements are overly burdensome as a matter of law. Petitioners' Br., 45. This contention is also without merit. This Court has recognized that record-keeping requirements applicable to government subsidies do not impermissibly burden expressive activity. For example, in *Regan v. Taxation With Representation*, 461 U.S. at 544-46, this Court upheld the constitutionality of a federal tax law requiring non-profits to establish a separate entity to conduct lobbying in order for contributions made to the non-profits to be tax deductible. As this Court observed, "[t]he IRS apparently requires only that the two groups be separately incorporated and keep records adequate to show that tax deductible contributions are not used to pay for lobbying. This is not unduly burdensome." *Id.* at 544, n. 6.

Similarly, in *Rust v. Sullivan*, 500 U.S. 173, this Court upheld, against a facial challenge, a federal requirement that a recipient of federal family planning grant money keep any pro-abortion activities, for which the grant funds could not be used, "physically and financially separate" from activities for which the funds could be used. "Mere bookkeeping separation" was not sufficient. *Rust*, 500 U.S. at 180-81, 196. This Court recognized that "[b]y requiring that the Title X grantee engage in abortion-related activity separately from activity receiving federal funding, Congress has . . . not denied it the right to engage in abortion-related activities." *Id.* at 198. Rather, "Congress has merely refused to fund such activities out of the public fisc, and the Secretary has simply required a certain degree of separation from the Title X project in order to ensure the integrity of the federally funded program." *Id.*

By their plain terms, AB 1889's record-keeping provisions are far less onerous than those upheld in *Regan* and *Rust*. *Regan*, 461 U.S. at 544; *Rust*, 500 U.S. at 180-81 and 197. Unlike the requirements in *Regan* and *Rust*, AB 1889 does not require employers to establish separate organizations to engage in activities the government does not wish to subsidize. In addition, there was strong evidence in the record that AB 1889's requirements are not burdensome and that government grants routinely require record-keeping to ensure the proper use of expenditures. *See* J.A. 280-83.

Notwithstanding, the Chamber of Commerce cites *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) (*Massachusetts Citizens*) (plurality opinion) for the proposition that AB 1889's accounting requirements are overly burdensome. *Massachusetts Citizens* is inapposite. *Massachusetts Citizens* involved an *as applied* challenge to a federal law that bars corporations from spending their own treasury funds to influence a federal election. *Massachusetts Citizens,* 479 U.S. at 241. The plaintiff was a modest nonprofit, nonstock corporation that did not engage in any business activities at all. *Id.* at 241-42. Its sole purpose was "to disseminate political ideas, not to amass capital." *Id.* at 259. It "did not accept contributions from business corporations or unions." *Id.* at 242. Rather, "[i]ts resources [came] from voluntary donations from 'members' and from various fundraising activities such as garage sales, bake sales, dances, raffles, and picnics." *Id.*

While the challenged statute prohibited the plaintiff from using its own treasury funds to support political candidates, it did permit the organization to engage in limited independent campaign spending with other funds donated for that specific purpose, but only if it first established a segregated fund and complied with a multitude of bookkeeping, administrative and disclosure obligations. *Massachusetts Citizens*, 479 U.S. at 253-54. These requirements included the appointment of a treasurer and the filing of periodic reports with the Federal Election Commission containing specified, detailed information, including

"the total amount of receipts, detailed by 10 different categories; the identification of each political committee and candidate's authorized or affiliated committee making contributions, and any persons making loans, providing rebates, refunds, dividends, or interest or any other offset to operating expenditures in an aggregate amount over $200; [and] the total amount of all disbursements, detailed by 12 different categories; . . . . " *Id.* It was in this as-applied context that the plurality concluded that the "[d]etailed record-keeping and disclosure obligations, along with a duty to appoint a treasurer and custodian of the records, impose administrative costs that many small entities may be unable to bear. Furthermore, such duties require a far more complex and formalized organization than many small groups could manage." *Id.* at 254-55 (footnote omitted).

The contrast between *Massachusetts Citizens* and this case is stark. First, this is a facial challenge only. Unlike the showing of burden made with respect to the particular plaintiff in *Massachusetts Citizens,* the Chamber of Commerce has failed to establish that all employers who are awarded state grants or participate in state programs (such as hospitals) lack the sophistication or wherewithal to comply with AB 1889's record-keeping provisions. Those provisions simply require employers who incur expenses to assist or deter union organizing to "maintain records sufficient to show that state funds have not been used" for those activities. *See* Cal. Gov't Code § 16645.2(c). And while those provisions prohibit

grant recipients and program participants from commingling state funds with other funds if the recipients choose to finance activities to assist or deter union organizing, Cal. Gov't Code § 16646(b), AB 1889 expressly provides that "[n]othing in [AB 1889] requires employers to maintain records in any particular form." Cal. Gov't Code § 16648. Given the regulatory schemes governing state grants and programs discussed above, and the expert testimony in the record indicating that AB 1889's accounting and record-keeping provisions "appear to be significantly less burdensome than the detailed requirements for federal grant recipients," the Chamber of Commerce cannot demonstrate, as a facial matter, that all employers covered by AB 1889 face the same sort of burden as did the entity at issue in *Massachusetts Citizens,* 479 U.S. at 241-42, 253-54. *See* J.A. 282-83, ¶ 8.

More important, *Massachusetts Citizens* involved limitations on the expenditures of an organization's *own* funds for political speech, an intrusion on First Amendment rights that can only be justified by a compelling state interest. *Massachusetts Citizens*, 479 U.S. at 256. Because AB 1889 simply declines to subsidize speech with state funds and does not restrict the use of an employer's own funds, it need not be justified by a compelling state interest. *See Regan v. Taxation With Representation,* 461 U.S. at 545; *Rust v. Sullivan,* 500 U.S. at 197. This Court expressly underscored that point in *Massachusetts Citizens* when it expressly distinguished *Regan* on the ground that

"there is no right to have speech subsidized by the Government." *Massachusetts Citizens*, 479 U.S. at 256, n. 9.[8]

Finally, AB 1889's penalty and attorney fee provisions do not unduly burden employers. AB 1889 provides that employers who violate AB 1889 are liable for the amount of the state funds spent on activities supporting or opposing union organizing, a civil penalty of twice the amount of the expenditure, and reasonable attorney fees and costs. Cal. Gov't Code §§ 16645.2(d), 16645.7(d), 16645.8(d). These civil penalties are directly tied to the amount of state funds used for prohibited activity. The potential penalties are thus measured and reasonable. Moreover, statutes commonly allow reasonable attorney fees only to a prevailing plaintiff. *See, e.g.*, Cal. Ins. Code §§ 785, 789(e) (West 2008) (insurance transactions in which insurer, broker, agent, and/or others violate their duty of honesty, good faith, and fair dealing to a prospective insured who is 65 years of

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[8] The Chamber of Commerce's argument that AB 1889's record keeping provisions would effectively silence employers, as a matter of law, is also undercut by the fact that record-keeping requirements are mandated in other contexts as well. Indeed, the Supreme Court has imposed extensive record-keeping requirements on unions engaged in political speech, so as to ensure that no dues money received from workers who object to such expenditures are used for those purposes. *See Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234, 237 (1977); *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 304-09 (1986). Such requirements, however, have not prevented such organizations from continuing to actively engage in such speech.

age or older); Cal. Bus. & Prof. Code § 6412.1(b) (West 2008) (unlawful acts of legal document assistants or unlawful detainer assistants); Cal. Bus. & Prof. Code §§ 6450, 6455(a) (West 2008) (violations of laws pertaining to paralegals); 15 U.S.C. § 2310(d)(2) (2008) (Magnuson-Moss Warranty Act); 15 U.S.C. § 26 (2008) (the Clayton Act), and 18 U.S.C. § 1964(c) (2008) (Racketeer Influenced and Corrupt Organizations Act (RICO)).

Similarly, that AB 1889 provides for taxpayer lawsuits does not render the legislation unduly burdensome as a matter of law. *See* Cal. Gov't Code § 16645.8(a). As the en banc court below correctly observed,

> In this respect, the statute is no different from any number of other federal and state laws or qui tam causes that enable private attorneys general to help detect, punish and deter wrongdoing. In contrast to some such statutes (e.g., § 4 of the Clayton Act, 15 U.S.C. § 15), which encourage private suits by permitting plaintiffs to be awarded treble damages, AB 1889 only allows private litigants to recover attorney's fees and costs – the damages go to the state. *See* § 16645.8(d).

Pet. App. 5a, n. 3.

For these reasons, the Chamber of Commerce is wrong when it contends that, as a facial matter, AB 1889 constitutes a cognizable burden on employers

that effectively chills them from using their own funds to assist or deter union organizing. To the contrary, AB 1889's record-keeping and enforcement provisions are reasonable and measured.

II.

AB 1889'S GRANT AND PROGRAM PROVISIONS ARE NOT PREEMPTED UNDER THE *GARMON* DOCTRINE

The *Garmon* preemption doctrine "safeguards the primary jurisdiction of the National Labor Relations Board [NLRB] to pass judgment on certain conduct." *Livadas v. Bradshaw*, 512 U.S. 107, 118 (1994); *see also Boston Harbor*, 507 U.S. 218, 224-25. To preserve the NLRB's jurisdiction, the *Garmon* doctrine prohibits state and local regulation of conduct that is actually or arguably protected by Section 7 of the NLRA, as well as conduct that is actually or arguably prohibited by Section 8 of the Act. *Boston Harbor*, 507 U.S. at 224-25; *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 187-88 (1978). Because AB 1889 neither regulates conduct that is actually or arguably protected by Section 7 or actually or arguably prohibited by Section 8, AB 1889 is not preempted under *Garmon*.

A. AB 1889 Does Not Regulate Speech That is Actually or Arguably Protected Under *Garmon*

The Chamber of Commerce argues that AB 1889 is preempted under *Garmon* based on its interpretation of Section 8(c) of the NLRA, which is codified at 29 U.S.C. § 158(c). *See* Petitioners' Br., 23-24. Subdivisions (a) and (b) of Section 8 set forth the activities deemed "unfair labor practices" by employers and labor organizations, respectively. Subdivision (c), upon which the Chamber of Commerce relies for its *Garmon* preemption analysis, provides: "[t]he expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit." 29 U.S.C. § 158(c) (2008). Arguing that Section 8(c) is an appropriate basis to support *Garmon* preemption, the Chamber of Commerce reasons that, "employer freedoms, such as the freedom to engage in noncoercive speech, are 'protected' by the NLRA by preventing government interference with that freedom, just as the First Amendment 'protects' citizens' speech by preventing 'Congress' from interfering with it." Petitioners' Br., 24, n. 2 (*quoting Healthcare Ass'n*, 471 F.3d at 99).

As the United States implicitly acknowledges, however, using Section 8(c) as a basis to establish preemption under *Garmon* is unsound. United States' Br., 26 (stating that the en banc court, when evaluating *Garmon,* "incorrectly focused its attention on the question whether A.B. 1889 regulates employer speech that is protected or affirmatively authorized by the NLRA.").

Indeed, Section 8(c) "merely implements the First Amendment." *NLRB v. Gissel Packing Co.*, 395 U.S. at 617. That is, Section 8(c) makes it clear that an employer does not commit an unfair labor practice by expressing its views regarding union organizing. Section 8(c) thus operates similarly to a savings clause, clarifying that the provisions of section 8(a), defining unfair labor practices by the employer, should not be interpreted to extend to noncoercive speech, which is protected by the First Amendment. Any protections on free speech are found in the First Amendment, and not the NLRA. As discussed above, government limitations on the use of its funds to subsidize speech, similar to the limitation in AB 1889, do not constitute regulation of speech and have been consistently upheld by this Court when challenged under the First Amendment. *See, e.g., Rust v. Sullivan*, 500 U.S. at 192-93 and *Regan v. Taxation With Representation*, 461 U.S. at 544-46.

The Chamber of Commerce interprets these First Amendment cases far too narrowly when it suggests

that they are limited to situations in which the government is funding a programmatic message. Petitioners' Br., 54. *Regan*, for example, has nothing to do with the government funding a programmatic message. Congress simply did not wish to subsidize private lobbying activity. *Regan*, 461 U.S. at 544.

Moreover, the question whether the government is funding a programmatic message is relevant when the government's funding decisions constitute viewpoint discrimination. *See United States v. American Library Association,* 539 U.S. 194, 213, n. 7 (plurality opinion) ("[*Legal Services Corp. v. Velazquez,* 531 U.S. 533, 542 (2001)] held only that viewpoint-based restrictions are improper 'when the [government] does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers.'" (citations and emphasis omitted)). AB 1889 cannot properly be characterized as discriminating on the basis of viewpoint. AB 1889 does not prohibit employer speech on the topic of union organizing. Rather, AB 1889, in a viewpoint neutral manner, prohibits the use of state grant and program funds for activities related to assisting, promoting, *or* deterring union organizing. *See Davenport v. Washington* 127 S. Ct. 2372, 2382 ("[q]uite obviously, no suppression of ideas is afoot, since the union remains as free as any other entity to participate in the electoral process with all available funds other than the state-coerced agency fees lacking affirmative permission. *Cf. Regan, supra*, at 549-550[ ] (*First Amendment* does

not require the government to enhance a person's ability to speak)."). Accordingly, AB 1889's restrictions on the use of state funds for an activity that the State declines to subsidize do not violate the First Amendment.

Yet, by asserting that Section 8(c) creates affirmative free speech rights *independent* of the First Amendment, the Chamber of Commerce requests that this Court grant employers broader speech rights than they would otherwise enjoy under the First Amendment. There is no reason to conclude that, through Section 8(c), Congress provided such an expansive right that would invalidate legitimate state action. Accordingly, even if Section 8(c) provides an employer with a free speech protection, that NLRA-created right should be no broader than the free speech right protected by the First Amendment. Because the State's decision to decline to subsidize protected speech does not offend the First Amendment, the Chamber of Commerce's *Garmon* challenge predicated on Section 8(c) fails.

B. AB 1889 Does Not Regulate Speech That is Actually or Arguably Prohibited Under *Garmon*

The United States contends that AB 1889 regulates "coercive" employer speech, the same speech that is *prohibited* by Section 8 of the NLRA and, therefore, it is preempted under the *Garmon* doctrine. United States' Br., 24-25. This contention is incorrect.

Under Section 8 of the NLRA, it is an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights" guaranteed in section 7 of the NLRA. 29 U.S.C. § 158(a)(1) (2008). Employer speech is not considered "coercive," for purposes of Section 8, if the speech "contains no threat of reprisal or force or promise of benefit." 29 U.S.C. § 158(c).

Contrary to the United States' contention, AB 1889 does not impose penalties for the same conduct that is prohibited under Section 8. Penalties are not available under AB 1889 on the basis that an employer has engaged in "threats of reprisal, force or promise of benefit," an issue that would be exclusively within the NLRB's jurisdiction. Rather, AB 1889 penalties are only available if the employer engages in a different activity, using state funds to pay for an employer's activities to assist or deter union organizing. This is true regardless of whether or not the speech is coercive.

For this reason, AB 1889 is not similar to *Gould*, in which a Wisconsin statute that prohibited employers who had engaged in repeated violations of the NLRA from doing business with the State was held to be preempted under the *Garmon* doctrine. *Gould*, 475 U.S. 282, 283-84. Unlike the statute at issue in *Gould*, AB 1889 does not function "as a supplemental sanction for violations of the NLRA." *Id.* at 288.

Moreover, the prosecution of an AB 1889 enforcement action would not require a state court to decide whether an employer engaged in speech that was coercive. The en banc court correctly concluded that under the primary jurisdiction test set forth in *Sears,* 436 U.S. at 188, there is an insufficient identity of claims between AB 1889 and the NLRA to warrant *Garmon* preemption. Pet. App. 26a-28a. The United States implicitly recognizes this. Its *Garmon* preemption argument is premised, in part, on the assumption that AB 1889 is preempted under the *Machinists* doctrine to the extent that AB 1889 applies to state funds spent on an employer's non-coercive speech. United States' Br., 25 ("But because much of A.B. 1889 is preempted under *Machinists* principles, a state court considering an A.B. 1889 claim would have to attempt to discern whether employers engaged in coercive or prejudicial speech . . . as part of the preemption analysis – the same analysis undertaken by the Board."). But, as no part of AB 1889 is preempted under the *Machinists* doctrine, the United States' *Garmon* argument necessarily fails.

C. AB 1889 Falls Within The Exception to *Garmon* Preemption for Matters "Deeply Rooted in Local Feeling and Responsibility"

Even if AB 1889 were found to be intruding on an area that is actually or arguably protected or prohibited by the NLRA for purposes of *Garmon*

preemption, the en banc court below correctly determined that the recognized exception to *Garmon* preemption for matters "deeply rooted in local feeling and responsibility" would apply to AB 1889. Pet. App. 31a.

AB 1889 falls squarely within this exception. Indeed, this Court has recognized that state matters such as libel and tort claims are so deeply rooted in local feeling and responsibility as to fall within the purview of this exception. *See Linn v. Plant Guard Workers,* 383 U.S. 53, 62 (1966) (state malicious libel action); *Int'l Union, United Auto Workers of America (UAW CIO) v. Russell*, 356 U.S. 634, 644-46 (1958) (state action for malicious interference with an employee's rights).

Here the state interest at issue should be granted even more deference. At their core, AB 1889's grant and program provisions further the exercise of California's sovereign right to manage and control its own financial affairs. This is an issue of exceptional importance to the State.

This Court has long recognized that managing a state's own fiscal affairs is a state's sovereign right. Indeed, the importance of protecting states from "judicial interference in the vital field of financial administration," underlies the protection, afforded by the Eleventh Amendment, of the state treasury from damage awards even where injunctive relief would be

allowed. *See Great Northern Life Ins. v. Read,* 322 U.S. 47, 53-54 (1947).

The significance of a state's sovereign interest in decisions regarding the use of its funds was similarly recognized in *San Antonio Independent Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973). There, the Court rejected, on equal protection grounds, a class action challenging a school-financing system that was based on local property taxation and refused to order the State of Texas to redistribute funds between school districts. *Id.* at 4-6. In reaching its decision, the Court noted that the plaintiffs had brought "nothing less than a direct attack on the way in which Texas has chosen to raise and disburse state and local tax revenues." *Id.* at 40. The Court recognized that it was thus being asked to "intrude in an area in which it has traditionally deferred to state legislatures." *Id.* (footnote omitted). It refused to do so. Indeed, with respect to the Equal Protection Clause, "[t]his Court has often admonished against such interferences with the State's fiscal policies. . . . " *Id.* It is submitted that the exercise of such restraint is also appropriate in the context presented here.

California has a sovereign right to control its fisc. California's decision to enact AB 1889's grant and program provisions falls squarely within the exception to *Garmon* preemption for matters deeply rooted in local feeling and responsibility.

CONCLUSION

The Ninth Circuit's decision should be affirmed.

Dated: February 12, 2008

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of the
State of California

JANET GAARD
Chief Assistant Attorney General

MANUEL M. MEDEIROS
Solicitor General

GORDON BURNS
Deputy Solicitor General

LOUIS VERDUGO, JR.
Senior Assistant Attorney General

RICHARD T. WALDOW
Supervising Deputy Attorney General

ANGELA SIERRA
Supervising Deputy Attorney General
(*Counsel of Record*)

Counsel for the State Respondents

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IN THE

Supreme Court of the United States

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, *ET AL.*,

Petitioners,

v.

EDMUND G. BROWN, JR., *ET AL.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

ROBIN S. CONRAD
SHANE BRENNAN
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337
Of Counsel

WILLIS J. GOLDSMITH
(Counsel of Record)
JONES DAY
222 East 41st Street
New York, NY 10017
(212) 326-3649
Counsel for Petitioners

[Additional counsel listed on signature page]

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Respondents' briefs have narrowed and focused the issues here, through concessions which demonstrate that reversal is required. Respondents concede that AB 1889 does not further any fiscal interest in cost savings or programmatic efficiency. And they do not dispute that AB 1889 burdens employers wishing to speak about union organizing. These concessions end this case. This Court's precedents are unequivocal: Non-proprietary exercises of the spending power impinging on congressional labor policy—here, unhindered debate about union organizing—are preempted. Acceptance of respondents' implicit invitation to reverse this established precedent would wreak havoc on the NLRA's paramount goal of establishing national uniformity by authorizing 50 states and over 3,000 counties and localities to pursue their own idiosyncratic labor policies through spending restrictions. Tellingly, respondents have *no* response to the debilitating balkanization of national labor policy that would result from their position.

A. Respondents Concede That AB 1889 Does Not Further Any Fiscal Interest

Respondents have abandoned their principal argument below that AB 1889 serves a proprietary interest exempt from preemption under *Building & Construction Trades Council v. Associated Builders & Contractors of Mass./R.I., Inc.*, 507 U.S. 218 (1993) ("*Boston Harbor*"). Respondents now concede that AB 1889's spending restriction was not designed to achieve cost savings or programmatic efficiencies. Rather, California imposed a spending restriction on, or "refus[ed] to subsidize," employer speech about unionization solely because "the legislature believed [that such speech] may interfere with an employee's

choice about whether to join a union." Brief for State Respondents ("Cal. Br.") 16, 38. This view is echoed by the sponsor and author of AB 1889, intervenor California Labor Federation: AB 1889 implements California's labor policy judgment that "the government would be interfering with free debate [about unionization] by subsidizing the costs of private lobbying or proselytizing" about union organizing. Brief for Respondents AFL-CIO and California Labor Federation ("AFL-CIO Br.") 17. In short, the purpose of the spending restriction is to protect *employees* from "interference," not to protect *California's* treasury or the integrity of its programs.

The plain language of AB 1889 compels these concessions, making clear that the funding restriction is imposed because it "is the policy of the state not to *interfere with an employee's choice* about whether to join or to be represented by a labor union" and, "*[f]or this reason*," the State will not "subsidize" activity that it views as constituting such interference—*i.e.*, "efforts by an employer to assist, promote, or deter union organizing." 2000 Cal. Stat. ch. 872, § 1. Thus, all parties now adopt the Ninth Circuit's conclusion that it is "clear that the legislation's purpose is to prevent 'state funds and facilities' from being used to subsidize an employer's attempt to influence employee choice about whether to join a union" and does not "reflect California's interest in the efficient procurement of goods and services." Pet. App. 11a.

Consequently, while it is certainly true that "the State has an obvious and strong interest in controlling costs and ensuring that state funds are used for those activities that the State believes will most effectively further [the programmatic] purpose"

(Cal. Br. 22), this is of no relevance here because all agree that this fiscal interest is *not* being furthered by AB 1889. Rather, AB 1889 fulfills the labor policy purpose of "refus[ing] to subsidize" an activity the State views as undesirable (or at least unworthy of subsidization) because it purportedly interferes with employee choice.

Indeed, respondents' defense of AB 1889 is that it is analogous to specific benefit restrictions designed to express a legislative value judgment concerning the activity being denied support, of the sort at issue in all the constitutional cases respondents rely upon. Like the "refusal to subsidize" special interest lobbying or abortion, AB 1889 is concededly and obviously not designed to decrease expenditures or increase tax revenues. *See Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 550 (1983) (denying tax benefit because Congress was concerned that groups would "lobby to promote the private interests of their members"); *Harris v. McRae*, 448 U.S. 297, 319 (1980) (Hyde Amendment's denial of abortion funding was "a reflection of 'traditionalist' values towards abortion"). Rather, like those restrictions, AB 1889 advances the policy purpose of refusing to assist activities viewed as affirmatively harmful, or at least sufficiently controversial to offend a cognizable segment of taxpayers, much as the Hyde Amendment's restriction on abortion funding was animated by policy concerns about abortion, not the additional spending caused by funding abortions.

Since a labor policy "purpose" is the only one "advanced in support of," or that can "credibly be ascribed" to, AB 1889, this is the end of the case. *See*

Wis. Dep't of Indus., Labor & Human Relations v. Gould Inc., 475 U.S. 282 (1986). The fact that the labor policy regulation is in the form of a "refusal to subsidize" under the spending power, rather than the police power, is—as the *Gould* Court unanimously held—a "distinction without a difference." *Id.* at 287. And the interference with federal labor policy here is more direct and harmful because it adversely affects activities that the NLRA *authorizes*, whereas the debarment in *Gould reinforced* the NLRA's proscriptions by refusing to subsidize serial violators of the federal Act.

1. Undaunted by *Gould*'s dispositive holding, respondents nevertheless defend AB 1889 through rhetorical slogans that this Court has repeatedly made clear are facially insufficient, in the preemption context, to justify state efforts to withhold public benefits. Specifically, respondents argue that AB 1889 is not a spending restriction that provides a disincentive to engage in noncoercive speech about unions, but a "refusal to subsidize" that "merely" withholds incentives for engaging in that speech. AFL-CIO Br. 14, 16; *accord* Cal. Br. 15-16. And since, according to the constitutional funding cases, government sometimes has a legitimate interest in withholding such incentives in order to remain "neutral" concerning activity some taxpayers view as undesirable, respondents maintain that California, *ipso facto*, has a legitimate labor policy interest in withholding funds for the nonthreatening employee speech it views as improperly interfering with employee choice. *See* Cal. Br. 19; AFL-CIO Br. 19.

The basic flaw in this argument is that, while the government may sometimes deny funding to achieve

"certain *permissible* goals" under the Constitution, *Rust v. Sullivan*, 500 U.S. 173, 194 (1991) (emphasis added), it is not "permissible" for a state to advance an interest that—although legitimate "in the *absence* of the NLRA," *Gould*, 475 U.S. at 289 (emphasis added)—is inconsistent with the comprehensive federal scheme established by that Act, *see Livadas v. Bradshaw*, 512 U.S. 107, 120 (1994). Withholding state funds "necessarily discourages" (*Rust*, 500 U.S. at 194) activities that the NLRA encourages. This deterrent effect is impermissible, regardless whether the state's motive for imposing it is to remain "neutral" by not "subsidizing" employer activity, because the NLRA requires that certain interactions between unions and employers—such as noncoercive speech about union organizing—"be left [to] the free play of contending economic forces" without *any* governmental regulation. *See Lodge 76, Int'l Ass'n of Machinists v. Wis. Employment Relations Comm'n*, 427 U.S. 132, 140 n.4 (1976) ("*Machinists*") (internal quotation marks omitted).

More specifically, respondents' "refusal to subsidize" argument is, dispositively, irreconcilable with *Gould*. To use respondents' nomenclature, all Wisconsin was doing in that case was "refusing to subsidize," through its contracting dollars, employers that repeatedly committed unfair labor practices. Surely the State had a legitimate interest in withholding subsidies for such manifestly improper behavior, in the absence of the NLRA. Indeed, this is precisely the argument that was made in defense of the statute in *Gould* by Wisconsin and the AFL-CIO, in terms which almost precisely echo respondents'

argument here.[1] Nevertheless, this Court found that this was an improper use of the spending power because such a refusal to subsidize sanctioned those excluded from the "subsidy" and states are not permitted to establish labor policy that frustrates the NLRA's carefully reticulated scheme. *See Gould*, 475 U.S. at 287-88.

As this reflects, respondents' notion that "refusals to subsidize" somehow escape preemption proves far too much, and indeed creates an even broader loophole than that established by the Ninth Circuit below. A *Gould*-like funding cut-off is, if anything, a more straightforward "refusal to subsidize" than the "use" restriction here, since the cut-off has no effect on an employer's *private* funds (through AB 1889-type prohibitions on "commingling" and the like), but simply constitutes a decision to not fiscally support those who violate federal labor laws. Respondents' extensive reliance on *Regan* confirms this overreaching since the statute there made refraining from lobbying with *private* funds a "condition . . . for *receipt*" (Pet. App. 17a) of the tax-deduction subsidy. *See* 461 U.S. at 543-44. Thus, the legislation in

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[1] Wisconsin in *Gould* cited *Harris* for the proposition that "the duty not to interfere with the absolute constitutional right of a woman to abort does not require Congress to pay for it," and argued that the NLRA did not require it to "contribute to the profits of miscreants by hiring them." Brief for Appellants, No. 84-1484, at 31. As *amicus*, the AFL-CIO similarly defended Wisconsin's "decision not to do business with repeat violators of the NLRA" with reference to *Harris*, *Regan*, and *Maher v. Roe*, 432 U.S. 464 (1977), and argued that "it is inconceivable that the [NLRA] compels the course of conduct that aids the labor-law violator." Brief of AFL-CIO, No. 84-1484, at 9, 10, 22.

Regan contained those features which even the Ninth Circuit agreed would cause a funding restriction to be preempted. Indeed, under the regime advocated by respondents, a state could pass legislation preventing companies from deducting union-related expenses as "ordinary and necessary" business expenses, or otherwise manipulate the tax code to deter activity protected by the NLRA. All of this would fall under the "refusal to subsidize" rubric.

Relatedly, California's supposed "desire to remain 'neutral' . . . does not determine pre-emption" because *all* state decisions to withhold or restrict public benefits from those engaged in NLRA-authorized activities can be characterized as "neutral," in the sense that such decisions prevent associating the public fisc with the private activities. *Livadas*, 512 U.S. at 120, 129. The fact that AB 1889's spending restriction is purportedly motivated by California's desire to not support noncoercive employer speech—*i.e.*, to remain "neutral"—in no way changes the fact that singling out this activity for "non-support" will discourage such activity. Such skewing of employer (or union) incentives to engage in NLRA-authorized activity "stands as an obstacle" to the "objectives" of "federal law." *Id.* at 120 (internal quotation marks omitted). Consequently, as *Livadas* explains, such "professions of 'neutrality'" cannot salvage a law from preemption, as reflected in the fact that this Court preempted the withholding of public benefits in that case, in *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608 (1986), and in *Nash v. Florida Industrial Commission*, 389 U.S. 235 (1967), even though all could be "re-described as following a 'hands-off' policy." 512 U.S. at 129-30. All these

points were made in the opening brief (pp. 26-28, 38-40), but respondents simply ignore them.

Of course, AB 1889 is not remotely "neutral" under any proper understanding of that term. First, it singles out expenditures relating to union speech without any effort to restrict similar employee-relations expenditures. Second, it affirmatively allows expenditures to, *inter alia*, facilitate *union* access to promote organizing or voluntarily *recognize* a union. *See* Cal. Gov't Code § 16647(b), (d).

2. For all these reasons, and the reasons noted in the opening brief (pp. 51-54), respondents' attempted analogy to constitutional funding cases is entirely misplaced.

First, *Gould*, *Livadas*, *Golden State*, and *Nash* all preempted refusals to subsidize or to withhold benefits. This would not have been possible if the constitutional funding cases really stood for the proposition that refusals to subsidize do not constitute a burden sufficient to trigger NLRA preemption.

Second, the constitutionality of a state law says nothing about the entirely different question of whether the NLRA preempts the law. The issue in the constitutional cases is whether funding restrictions that further "permissible goals" unduly burden a citizen's rights; the issue in the preemption cases is whether the state goals are "impermissible" because they are inconsistent with federal labor policy. This precludes respondents' heavy reliance on *Lyng v. UAW*, 485 U.S. 360 (1988). Unlike the states, Congress is not constrained by the NLRA, so its decision to amend the Food Stamp Act to the detriment of striking workers needed to comply only

with the Constitution. *See id.* at 371. *Lyng* does *not* address whether a similar labor policy would be a "legitimate governmental objective" for a state (AFL-CIO Br. 19 (internal quotation marks omitted)), and *Livadas* clearly holds that it is not. *See* 512 U.S. at 116-17.

Third, the only relevance of the constitutional cases is that they all *confirm* that funding restrictions burden the activity singled out for de-funding. All the First Amendment cases recognize that a funding restriction "necessarily discourages" speech by the recipient. *Rust*, 500 U.S. at 194. Similarly, the *Lyng* Court found it "difficult to deny" that Congress' denial of food stamps to striking workers "works at least some discrimination against strikers and their households," 485 U.S. at 371, because "[d]enying [food stamp] benefits makes it harder for strikers to maintain themselves and their families during the strike and exerts pressure on them to abandon their union," *id.* at 368; *see also Maher*, 432 U.S. at 474 (denial of funding "may make it difficult . . . for some women to have abortions"). And the AFL-CIO in *Gould* candidly conceded that states may "affect private conduct through contractually-based incentives and disincentives," such that Wisconsin's refusal to deal constituted a "'penalty.'" Brief of AFL-CIO, No. 84-1484, at 9, 22.

Accordingly, the statement in *Harris* that "[a] refusal to fund protected activity, without more, cannot be equated with the imposition of a 'penalty' on that activity," 448 U.S. at 317 n.19, in no way suggests that funding restrictions do not impose a burden. *See* Cal. Br. 17; AFL-CIO Br. 16. This statement simply reflects the truism that funding

restrictions are not *equivalent* to affirmative penalties because the latter constitute a more direct interference and, since no financial support is involved, cannot be justified as an effort to "define the limits" of a government program. *Rust*, 500 U.S. at 194; *see generally Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 58 (2006) ("*FAIR*"). This in no way supports the absurd proposition that denying funding to engage in an activity does not discourage that activity—otherwise *Gould* would necessarily have reached a different result.

In any event, even assuming that a refusal to fund, "without more," imposes no burden, AB 1889 does far more than refuse to provide public funds. AB 1889 provides public funds *in exchange for* important programmatic services and then limits the recipient's *use* of those funds, as well as burdening *privately-derived* funds through onerous segregation requirements, enforced through treble damages and attorney's fees. It surely would have been a "burden" if the Hyde Amendment prohibited a recipient's *use* of money obtained from a welfare program, or public employment or contracting, to pay for abortions. The burden would have been even more obvious if the Hyde Amendment prohibited recipients from using their *own*, privately-derived funds to pay for an abortion, unless those funds were kept in a segregated account to avoid "commingling" with publicly-derived funds, upon pain of treble damages and attorney's fees. AB 1889 is not simply a failure to "*enhance* [the] ability to speak," *Davenport v. Washington Education Ass'n*, 127 S. Ct. 2372, 2382 (2007) (describing *Regan*; emphasis added), it *diminishes* petitioners' speech.

Similarly beside the point is that, at times, this Court has upheld such spending restrictions against constitutional challenge. It has done so on the ground that the Constitution does not require the government to *avoid* such deterrence, because the government is entitled to "define the limits of [its] program" and citizens are not entitled to receive money for speech which is outside the scope of that program. *Rust*, 500 U.S. at 194.[2] Here, there is no basis for excusing the deterrent effect, because states are *not* entitled to artificially limit their programs to discriminatorily exclude NLRA-authorized activity and petitioners *are* entitled to receive money for performing services *within* the scope of the state's program, without having to overcome obstacles to NLRA-authorized speech. Moreover, AB 1889's cross-cutting restrictions are unnecessary to preserve any programmatic message: It is "not a plausible fear" that an employer's *internal* communications with its employees will dilute the message of state-funded programs or be attributed to the State. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 841-42 (1995).

Finally, AB 1889, if anything, is more an exercise of the State's police power than its spending power, although the point is irrelevant in light of *Gould*. The Act restricts the *use* of money within the

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[2] Respondents note (Cal. Br. 55-56; AFL-CIO Br. 18) that there are other constitutionally adequate reasons for not subsidizing an activity. But AB 1889 is a restriction on the *use* of grant and program funds, and such restrictions have been upheld only where necessary to preserve programmatic message. *See Rust*, 500 U.S. at 194; *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541 (2001).

recipient's possession because of the "source" of that money. Analogously, federal campaign finance laws formerly placed restrictions on the expenditure of funds depending on their "source," yet these laws were not exercises of Congress' spending power. *See, e.g., Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 616 (1996) ("soft money" could be spent only on generic party-building activities, not on candidate-related activities). To be sure, the difference here is that the State is the "source" of the funds now in petitioners' bank accounts, but the fact remains that AB 1889 regulates how petitioners may *use* those funds. And the Act's segregation requirement and its imposition of treble damages and attorney's fees are clearly exercises of the State's police power. In contrast, Wisconsin in *Gould* used only its spending power to deter violations of the NLRA—its refusal to do business did not affect the contractors' private funds or otherwise restrict them. *See* 475 U.S. at 283-85.

B. Respondents Do Not Dispute That AB 1889 Burdens Employer Speech

Respondents do not suggest that AB 1889 is a hortatory enactment which imposes no burdens upon employers wishing to speak about union organizing. Although they attempt to *minimize* those burdens, this is of no moment because they do not (and cannot) deny that AB 1889 "impinge[s] on" speech that Congress intended to leave unregulated. *Machinists*, 427 U.S. at 146 (internal quotation marks omitted).

1. The State offers *no* response to the absolute ban that AB 1889 works on union-related speech by employers receiving *all* of their revenue from a state program, like petitioner Zilaco, Inc.'s CherryLee

facility. J.A. 166; *see also* J.A. 301. For such employers, AB 1889 conditions their continued operations on relinquishing their right to speak about union organizing.

Nor does the AFL-CIO (p. 29) deny that this is a burden, but, echoing the Ninth Circuit (Pet. App. 18a), asserts that this is the result of petitioners' "voluntary cho[ic]e." The fact that the burden results from a "voluntary choice," however, does not alter the fact that it is a burden. And this Court has made clear that state laws are preempted if they create an "unappetizing choice" between the exercise of NLRA rights and the receipt of state benefits. *Livadas*, 512 U.S. at 117 (discussing *Nash* and *Golden State*); *cf. FAIR*, 547 U.S. at 59 ("[T]he government may not deny a benefit to a person on a basis that infringes . . . speech *even if he has no entitlement to that benefit*.") (internal quotation marks omitted; emphasis added). Indeed, under the AFL-CIO's theory, California could prohibit any NLRA-protected activity because the burden would be the result of a "voluntary choice" to remain in the State.

2. Respondents also do not deny that AB 1889 burdens those employers that have private funds with which to speak about union organizing. The most respondents say is that AB 1889's regulatory requirements are "*less* onerous" than those upheld in the First Amendment cases. Cal. Br. 47 (emphasis added); *accord* AFL-CIO Br. 48. But the question is not whether the State has imposed the *most onerous burden* possible on employer speech, it is whether AB 1889 has any "real effect" on NLRA-authorized speech. *Livadas*, 512 U.S. at 119. Respondents do not dispute that it does.

Respondents concede that AB 1889 requires employers wishing to express their views about union organizing with non-"state" funds to create, and pay all union-related expenses out of, separate accounts. Cal. Br. 49-50; AFL-CIO Br. 47. That requirement burdens speech, a point on which all of this Court's campaign finance cases are in accord. *See* Brief for Petitioners ("Br.") 45-46 (collecting authority). Respondents address *one* of those cases, *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) ("*MCFL*"), and argue that the burden on the "small non-profit organization" there was *greater* than that on petitioners here. AFL-CIO Br. 49; *accord* Cal. Br. 48-50. But this is nonresponsive to the fact that AB 1889's segregation requirement imposes a cognizable burden. As *Austin v. Michigan Chamber of Commerce*—which respondents ignore—makes emphatically clear, the "organizational and financial hurdles in establishing and administering a segregated political fund" have the effect of "burden[ing] expressive activity," such that they must satisfy strict scrutiny. 494 U.S. 652, 657-58 (1990). Similarly, *Regan*'s suggestion that a far simpler segregation requirement was not "*unduly* burdensome" hardly suggests the absence of a burden. 461 U.S. at 544 n.6 (emphasis added).

Also, AB 1889 does more than impose segregation requirements. It requires detailed tracking of employee time and accounting of how the segregated funds are spent. Respondents acknowledge that similar "accounting requirements," imposed on unions to track expenditures of compulsory dues, are quite "burdensome." AFL-CIO Br. 51; accord Cal. Br. 51 n.8. AB 1889 also imposes severe penalties on employers if a court subsequently decides they

misallocated "state" funds to union organizing. Respondents have no response to this Court's opinions (*see* Br. 48-49) recognizing the chilling effect on speech caused by the risk of litigation and exemplary damages. *See also Credit Suisse Sec. (USA) LLC v. Billing*, 127 S. Ct. 2383, 2396 (2007) (the "fear" of "an antitrust lawsuit and the risk of treble damages" would cause underwriters to "act in ways that will avoid . . . conduct that the securities law permits or encourages").

Finally, it is important to note that the Byrd Amendment—which respondents otherwise liken to AB 1889—does *not* require the creation of a segregated account for the covered funds because it utilizes the exact *opposite* presumption of that found in AB 1889: "To the extent a person can demonstrate that the person has sufficient monies, other than Federal appropriated funds, the Federal Government shall assume that these *other monies* were spent for any influencing activities unallowable with Federal appropriated funds." 55 Fed. Reg. 24,540, 24,542 (June 15, 1990) (emphasis added); *accord* 48 C.F.R. § 3.802(a)(2) (Federal Acquisition Regulations). Indeed, the standard rule for federal grants and contracts with non-profit organizations is to preclude federal agencies from "requir[ing] separate depository accounts for funds provided to a recipient." 2 C.F.R. § 215.22(i).

C. Respondents' "Sovereign Interest" Discussion Is Irrelevant

Inexplicably, respondents argue at length about the State's need to "control[] program costs" and "ensur[e] the highest quality in the delivery of services." Cal. Br. 26; *accord* AFL-CIO Br. 23. But

this entire discussion is irrelevant because it is conceded and indisputable that AB 1889's purpose was *not* to achieve such economies, but to further a preempted labor policy "purpose." *Gould*, 475 U.S. at 287. Thus, even if AB 1889 had the unintended consequence of some fiscal savings, this would not save it from preemption. As the opening brief explains (pp. 38-39) and respondents ignore, this Court has held preempted state actions that frustrate federal labor policy even if they *also* advance reasonable fiscal interests. The restrictions on benefits in *Livadas* and *Nash*, for example, obviously had the effect of "conserv[ing] the State's money," *Livadas*, 512 U.S. at 127, but that did not excuse their "tendency to frustrate the purpose of Congress," *Nash*, 389 U.S. at 239.

1. In any event, it is not even *theoretically* possible that AB 1889 serves a fiscal interest.

First, there is no conceivable fiscal justification for AB 1889's imposition of a *use* restriction on grant and program funds that provide *reimbursement* to employers for the provision of "critical public services to California residents." Cal. Br. 26.[3] Any cost-savings interest would already have been achieved through negotiations on price or allowable costs. For example, as the AFL-CIO points out (pp. 49-50), reimbursement to some health-care providers under Medi-Cal does not "include expenditures to assist, promote, or deter union organizing." J.A. 244-257. Since such health-care providers never *receive* any

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[3] This is true whether payment is made before or after the provision of services.

state money covering union-related activities, AB 1889 cannot *reduce* state expenditures under this program. The State is out the reimbursed amount regardless how it is used. *See* Br. 36.

Second, the exception to this general rule is where, as noted in the opening brief (p. 35), the state has a legitimate fiscal interest in ensuring that *advanced* grant funds are not misspent on a non-grant-related purpose. But here as well, AB 1889 cannot serve any fiscal interest. Any *fiscal* decision concerning union-related expenditures will have already been made, one way or the other, in the specific grant to which AB 1889 applies. If, on one hand, a grant *allows* cost reimbursement for union-related expenses, like other aspects of managing the grantee's workforce, *this* is the fiscal decision and reflects the view that paying for such indirect costs efficiently furthers the grant's purpose. Because AB 1889's use restriction is *contrary* to that fiscal decision, it cannot be justified as a fiscal interest. If, on the other, a contract does *not* allow cost reimbursement for union-related expenses, then AB 1889 cannot serve a fiscal interest because the grant does not pay for any union-related activity, so there is no need for AB 1889 to prevent such "waste."[4] Either way, it is clear AB 1889 serves no fiscal goals. In all events, there is no rational *fiscal* interest in the State's policy of prohibiting

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[4] The decision to single out union-related expenses for non-reimbursement may indicate a purpose to regulate labor-management relations, not a legitimate proprietary interest. That issue is not presented here as AB 1889 is a cross-cutting restriction on use that concededly falls outside of *Boston Harbor*.

expenditures *opposing*, but allowing expenditures *facilitating*, union organizing.

2. Even more perplexing is respondents' extended discussion whether certain of petitioners' funds, received from the State in exchange for valuable public services, have retained or "los[t] their character as state funds." Cal. Br. 34. Respondents' thesis seems to be that the State has a "sovereign interest" in all funds that the State provides to the petitioner except for "profits" (so long as the "profits" are not potentially subject to recapture as "overpayments"). And, the argument continues, since the State has a "sovereign interest" in all such monies except "profits," then AB 1889's restrictions on non-"profit" funds somehow serves a non-preempted interest. *See* Cal. Br. 21-32; AFL-CIO Br. 19-29. To the extent this argument is comprehensible, it is plainly wrong.

Again, the question is not whether California retains a "sovereign interest" (whatever that may mean) in the monies transferred to petitioners, but whether it has a proprietary or fiscal interest in *prohibiting* petitioners' *use* of those funds for union-related speech. Since it is conceded that the State has no such interest, the metaphysical question of whether particular dollars transferred to petitioners have "lost their character as state funds" is beside the point. In any event, the "profits" distinction drawn by respondents for the first time in this Court simply confirms AB 1889's invalidity and is irreconcilable with the statute's plain language.

First, since AB 1889's restriction on the use of a small subset of grant or program funds ("profits") concededly interferes with the NLRA, it necessarily

follows that its restriction on the rest of those funds does so as well. If California has no non-preempted interest in prohibiting the use of, for example, $100 of a $1,000 grant (or however the State defines "profit") for union-related speech, it necessarily has no such interest as to the other $900. If anything, the $100 "profit" would seem to be more reasonably characterized as a "subsidy" than the $900, which merely covers the private recipient's out-of-pocket expenditures. While it is wholly illogical to draw *any* distinction between the $100 and the $900, there is certainly no rational basis for concluding that the State has a *greater* claim on the $900 because it is *less* of a "subsidy" and *more* the "State's" money than the $100 "profit."

Second, respondents' proposed exclusion of "profits" is also irreconcilable with the actual text of AB 1889. AB 1889 does not distinguish between "profit" and other monies but applies to "*any* money drawn from the State Treasury or any special or trust fund of the state." Cal. Gov't Code § 16645(d)(1) (emphasis added). Respondents maintain that a carve-out for "profits" is necessitated by the canon of constitutional doubt, but can identify *no* decision of any court that has attached any significance to the distinction between "profits" and "state" funds. *See* Cal. Br. 33-34; AFL-CIO Br. 24. In all events, this would not be a "plausible interpretation[] of [the] statutory text." *Clark v. Martinez*, 543 U.S. 371, 381 (2005).

Third, although AB 1889 was vigorously enforced for over two years and its validity has been litigated for another five, the *first* mention of a possible exception for "profits" came in the State's Brief In

Opposition.[5] This argument is therefore waived. *See, e.g., Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 n.4 (2002).

Fourth, respondents' supposed "saving" construction would only *add* to AB 1889's already Byzantine regulatory burdens. In addition to "state" and non-"state" funds, employers would also have to separately account for and segregate "profit" and "potential overpayments." The State does not even define "profit," let alone explain how it is to be determined in California's myriad and individualized grants and programs. An employer, for example, might project that it would clear $60,000 "profit" on a $500,000 grant. If that projection proved overly optimistic or if there was an alternative way of calculating profits, the $60,000 estimate would expose the employer to a union lawsuit questioning the employer's accounting, seeking intrusive discovery, and demanding treble damages and attorney's fees. Indeed, under respondents' proposed reading of AB 1889, an employer could *retroactively* violate AB 1889 by expending on union-related activity "profit" that turns out—in the final

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[5] The AFL-CIO (p. 27)—but not the State—misleadingly claims that the State agreed that AB 1889 did not apply to "profits" in the Ninth Circuit. All the State conceded, in response to a specific question at *en banc* oral argument, was that if a corporation receiving only "state" funds made a dividend payment, and the shareholder returned that money to the corporation, AB 1889 would no longer apply to that money. Pet. App. 32a n.20. This concession had nothing to do with "profits"; it simply acknowledged that AB 1889's restrictions do not extend to "state" money transferred to a third party.

accounting at the end of the fiscal year—to have been "overpayment." Cal. Br. 35 n.5.

3. In a transparent effort to obtain a remand, respondents argue that AB 1889 cannot be held preempted because this is a "facial" challenge and there has not been full factual exploration of whether all recipients earn "profits" or whether it is "unduly difficult" for employers to speak about union organizing. Cal. Br. 33, 44-46; *accord* AFL-CIO Br. 29, 45-47. But these facts are not material. It is conceded and indisputable that AB 1889 furthers a labor policy purpose and affects employers' incentives to engage in NLRA-authorized activity. Consequently, there are no valid applications of AB 1889 and no amount of factual development can salvage it from preemption under the governing legal standard.

An unfocused, individualized evidentiary "inquiry" into the precise *magnitude* of the burden suffered by petitioners will tell the Court nothing that cannot readily be gleaned from the face of the statute itself. Those petitioners with exclusively state funds cannot speak about unionization at all, while those with lesser amounts may do so only by complying with difficult and amorphous administrative requirements, enforced through *qui tam* litigation and severe civil penalties. These truisms will not in any way be illuminated by further litigation where petitioners describe the requirements in negative terms and respondents use more favorable adjectives. Even accepting as true the declaration of Nicholas Ross—which is the *only* evidence to which respondents point as creating dispute (Cal. Br. 45; AFL-CIO Br. 46-47)—there is no dispute that AB

1889's accounting requirements alone are burdensome: Mr. Ross simply says they are "less burdensome" than federal law. J.A. 283. And Mr. Ross did not even address, much less dispute, the deterrent effect caused by AB 1889's *qui tam* and civil penalty provisions. *See* Br. 50 n.8.

As noted, the deterrent effect of segregated funds, litigation, and punitive remedies are patent, and have been routinely recognized by this Court without full-blown trials to confirm the obvious. Indeed, although respondents attempt to distinguish *MCFL* as an "as applied" case (Cal. Br. 48; AFL-CIO Br. 49), the Court there and in *Austin* ascertained the burden on speech solely by reference to the textual commands of the relevant statutes. *See Austin*, 494 U.S. at 658; *MCFL*, 479 U.S. at 253-55. Similarly, the statute in *Gould* was found facially invalid, without analysis of the effect it had on other contractors, much less any effort to determine the statute's effect on every state contractor, as respondents suggest is required here. *See* 475 U.S. at 288.

Respondents' call for individualized factfinding also reveals a fundamental miscomprehension of the prohibited effect of AB 1889 and the nature of NLRA preemption. To adequately safeguard federal labor policy, this Court addresses "potential conflict" in "classes of situations," *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 242 (1959), and demarcates zones of activity that are not "regulable by States," *Machinists*, 427 U.S. at 149. The prophylactic nature of NLRA preemption "*precludes* an *ad hoc* inquiry into the special problems of labor-management relations involved in a particular set of

occurrences." *Garmon*, 359 U.S. at 242 (emphasis added).[6]

D. Respondents Miscomprehend Congressional Policy, *Machinists*, And *Garmon*

California (pp. 14, 18) does not dispute that noncoercive employer speech about unionization is an area that Congress intended to be left unregulated under *Machinists*. The AFL-CIO and respondents' *amici* contend otherwise: They would have this Court authorize every state and locality to *directly* prohibit and regulate nonprejudicial employer speech, and enforce those regulations through onerous civil penalties, creating a patchwork of conflicting rules governing employers' involvement in union organizing. This attempt to gut a key facet of the NLRA is meritless.

1. The AFL-CIO suggests (pp. 31-35) that Congress somehow did not intend for noncoercive employer speech to be "unregulated" (*Machinists*, 427 U.S. at 144) on the federal level because section 8(c) "merely" prohibits the NLRB from treating such speech as an unfair labor practice or evidence of one. But it is difficult to envision how Congress could have *more* directly manifested its intent that conduct be unregulated than by expressly prohibiting the NLRB from regulating or penalizing it as an unfair labor practice. As the opening brief notes (p. 22), section 8(c) is a far more direct and unequivocal expression of

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[6] In all events, if the Court agrees that the preemption issue turns on such case-by-case adjudication about "profits," etc., reversal is nevertheless required because the Ninth Circuit upheld AB 1889 as not preempted in *all* circumstances affecting grant or program funds. *See* Pet. App. 36a.

congressional intent than that at issue in *Machinists* itself, where there was no statutory language or legislative history suggesting a desire to leave "partial strike activity" unregulated. In contrast, as the Court has frequently noted, "the enactment of § 8(c) manifests a congressional intent to encourage free debate on issues dividing labor and management" and reflects "federal policies favoring uninhibited, robust, and wide-open debate in labor disputes." *Linn v. United Plant Guard Workers of Am., Local 114*, 383 U.S. 53, 62 (1966); *accord Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 273 (1974). Accordingly, there is nothing to the AFL-CIO's argument that, although the NLRB cannot regulate or penalize employers for engaging in nonthreatening speech about unions, states and localities are entirely free to do so.

The AFL-CIO also suggests (pp. 34-35) that there is no policy against regulating noncoercive employer speech because section 8(c) is not phrased as granting employers a "right" to engage in that speech. This is, of course, entirely meaningless semantics because the question is whether Congress intended to preclude regulation, not whether it did so, as in the Second Amendment, by bestowing a "right" on the potentially regulated or, as in the First Amendment, by prohibiting the relevant regulatory body—"Congress"—from making a "law" which infringes on the activity to be unregulated. In all events, this Court has referred to "non-coercive anti-union solicitation" as a "*right* . . . protected by the so-called 'employer free speech' provision of § 8(c)." *NLRB v. United Steelworkers*, 357 U.S. 357, 362 (1958) (emphasis added).

The AFL-CIO's next, equally irrelevant semantic argument (pp. 35-37) is that section 8(c) somehow does not express federal labor policy because Congress thought that prohibiting regulation of nonthreatening employer speech was required by the First Amendment. The only relevant issue under the Supremacy Clause, however, is whether Congress has adopted a federal labor law policy precluding restriction of noncoercive employer speech. Whether Congress did so because it independently believed that employees are best informed about unionization through robust and uninhibited debate or because it thought that the First Amendment compelled such a free marketplace of ideas, is of no consequence. If this Court determined tomorrow that the federal government could constitutionally regulate noncoercive employer speech, this would not affect the proscription against such regulation in the NLRA, nor its preemptive effect under *Machinists*.

The AFL-CIO's next irrelevant observation (pp. 34, 39-40) is that, when exercising its responsibility to ensure fair representation elections under section 9 rather than its authority to regulate employer's interference with unionization under section 8, the NLRB asks whether the employer's speech is such that it "renders improbable a free choice" in the election, *General Shoe Corp.*, 77 N.L.R.B. 124, 126 (1948), rather than whether the employer's speech is outside the protections of section 8(c) because it contains a "threat of reprisal," 29 U.S.C. § 158(c). But there is no cognizable difference between these two standards. Consequently, the NLRB's test for assessing whether employees' free choice has been eliminated is whether the employer's speech has been prejudicial or coercive. Thus, in the election context,

the NLRB will "not restrict the right of any party to inform employees of the advantages and disadvantages of unions and of joining them as long as such information is imparted to employees in a noncoercive manner." *Trent Tube Co.*, 147 N.L.R.B. 538, 541 (1964) (internal quotation marks omitted); *see also Rosewood Mfg. Co.*, 263 N.L.R.B. 420, 420 (1982) (employer speech "was coercive, thereby destroying the laboratory conditions"); *Excelsior Underwear Inc.*, 156 N.L.R.B. 1236, 1240 (1966) (explaining that "an employee who has had an effective opportunity to hear the arguments concerning representation is in a better position to make a more fully informed and reasonable choice"); *Dal-Tex Optical Co.*, 137 N.L.R.B. 1782, 1787 (1962) (employer speech contained "clear threats").[7] In all circumstances as the Solicitor General confirms, the NLRB "distinguish[es] *coercive speech* that violates section 8(a)(1) or is prejudicial to a fair election, from *non-coercive* speech that enhances employee free choice and is therefore immune from regulation." Brief for United States as *Amicus* ("U.S. Br.") 24 (internal citations omitted; emphasis added). The NLRB's construction of the NLRA's policies and their preemptive effect are "entitled to considerable deference." *Beth Israel Hosp. v. NLRB*, 437 U.S. 483,

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[7] As in public elections, the NLRB imposes various time, place, and manner restrictions on speech preceding a representation election. *See, e.g., Peerless Plywood Co.*, 107 N.L.R.B. 427, 428-30 (1953) (no speeches 24 hours before election). Such restrictions no more suggest that noncoercive employer speech may be regulated than do analogous restrictions in public elections suggest that political speech about elections may be regulated.

500 (1978); *see also Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 883 (2000).[8]

Finally, respondents argue that "the state's choice[] of how to spend its funds" is not an area that Congress intended to be "free from regulation." Cal. Br. 13, 17 (internal quotation marks omitted); *accord* AFL-CIO Br. 37-38. This is true, but noncoercive employer speech is to be free of regulation and thus, under *Gould*, the NLRA preempts a State's "choice" to "spend its funds" in a way that intentionally interferes with the NLRA. *See* 475 U.S. at 287-89.

2. To the extent that respondents argue that AB 1889 survives preemption as applied to coercive employer speech, they are wrong. As shown in the opening brief (p. 28), AB 1889 imposes penalties on coercive employer speech *in addition* to those imposed by the NLRA, in contravention of *Gould*. Respondents' only response is their facially erroneous argument that *Gould* is distinguishable because it did not involve a "refusal to subsidize." *See* Cal. Br. 58; AFL-CIO Br. 42-43. Also, as the Solicitor General explains (pp. 25-26), any effort to partially preserve AB 1889's application to *coercive* speech would necessarily run afoul of *Garmon* because a California court, before applying AB 1889, would first have to

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[8] Even if there were a federal policy of allowing regulation of nonthreatening employer speech in the election context, AB 1889 obviously applies outside that context and is thus preempted under *Machinists* to that extent. And, *within* the election context, AB 1889 imposes penalties *in addition to* those in the NLRA, and authorizes state courts to determine what constitutes speech "prejudicial to an election," so it would be preempted under *Garmon*. *See Gould*, 475 U.S. at 288.

draw a line between coercive and noncoercive speech, in conflict with the primary jurisdiction of the NLRB.

Nor does AB 1889 fall within the "deeply rooted" exception to *Garmon* preemption. *See* Cal. Br. 59-61; AFL-CIO Br. 43-44. The "deeply rooted" interests recognized by *Garmon* are general state policies, unrelated to labor relations, that are necessary to "the maintenance of domestic peace." *Garmon*, 359 U.S. at 247; *accord Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985). AB 1889 directly targets labor-management relations, not any general fiscal interest in cost effective services. As in *Gould*, this Court is not "faced here with a statute that can even plausibly be defended as a legitimate response to state procurement constraints or to local economic needs, or with a law that pursues a task Congress intended to leave to the States." 475 U.S. at 291.

3. Finally, respondents' repeated citation of three *federal* programs with similar use restrictions provides them no aid. *See, e.g.*, Cal. Br. 2; AFL-CIO Br. 1-3. Congress is not "preempted" from creating tailored exceptions to federal labor policy in specific contexts, and these *ad hoc* statutes do not purport to override the longstanding federal labor policy of robust debate about union organizing. *See* Br. 40-41 n.7. Unlike AB 1889, moreover, these use restrictions do not contain pro-union exceptions, require the creation of segregated accounts, or impose civil penalties. *See* 29 U.S.C. § 2931(b)(7); 42 U.S.C. §§ 9839(e), 12634(b); U.S. Br. 20-21. The Medicare Act provision upon which respondents also rely is only a limitation on *reimbursements* and imposes no

restriction on the *use* of those reimbursements. *See* 42 U.S.C. § 1395x(v)(1)(N).[9]

* * * * *

The judgment of the Court of Appeals should be reversed.

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[9] The suggestion by respondents' *amici* that these isolated statutes, out of the multitude of federal spending programs, and an *unofficial* 1980 report by a House subcommittee, reflect a consistent federal policy of "neutrality" is preposterous. *See* Brief for the State of New York *et al.* 21-27; Brief of AARP *et al.* 8-12. The rules governing federal grants and contracts to non-profit organizations notably do *not* disallow reimbursement for employer speech about union organizing. *See* 2 C.F.R. § 230, App. B. And the imposition of such a restriction in the Federal Acquisition Regulations on January 19, 2001 was quickly repealed. *See* 66 Fed. Reg. 66,986, 66,990 (Dec. 27, 2001).

Respectfully submitted,

ROBIN S. CONRAD
SHANE BRENNAN
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337
Of Counsel

STEVEN J. LAW
STEPHEN A. BOKAT
OFFICE OF CHIEF LEGAL
OFFICER AND GENERAL
COUNSEL, U.S. CHAMBER
OF COMMERCE
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5576
Of Counsel

BRADLEY W. KAMPAS
SCOTT OBORNE
JACKSON LEWIS LLP
199 Fremont Street
10th Floor
San Francisco, CA 94105
(415) 394-9400
Of Counsel

WILLIS J. GOLDSMITH
(Counsel of Record)
JONES DAY
222 East 41st Street
New York, NY 10017
(212) 326-3649

MICHAEL A. CARVIN
NOEL J. FRANCISCO
LUKE A. SOBOTA
JONES DAY
51 Louisiana Avenue,
N.W.
Washington, D.C. 20001
(202) 879-3939
Counsel for Petitioners

March 3, 2008

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No. 06-939

In the Supreme Court of the United States

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

EDMUND G. BROWN, JR., ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

RONALD MEISBURG
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

JOHN H. FERGUSON
Associate General Counsel

LINDA DREEBEN
Deputy Associate General Counsel

KYE PAWLENKO
KEVIN FLANAGAN
Attorneys
National Labor Relations Board
Washington, D.C. 20570

PAUL D. CLEMENT
Solicitor General
Counsel of Record

THOMAS G. HUNGAR
Deputy Solicitor General

NICOLE A. SAHARSKY
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, preempts a California law that prohibits private employers that receive state grant and program funds from using those funds "to assist, promote, or deter union organizing," Cal. Gov't Code §§ 16645.2, 16645.7 (West Supp. 2008).

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

This case concerns the preemptive scope of the National Labor Relations Act (NLRA), 29 U.S.C. 151 *et seq.* The National Labor Relations Board (Board) has primary authority for interpreting and administering the NLRA to ensure uniform application of national labor relations policy. At the invitation of the Court, the United States filed a brief as amicus curiae at the petition stage of this case.

STATEMENT

1. a. Congress enacted the NLRA to "create a national, uniform body of labor law and policy, to protect

the stability of the collective bargaining process, and to maintain peaceful industrial relations." *United States* v. *Palumbo Bros.*, 145 F.3d 850, 861 (7th Cir.), cert. denied, 525 U.S. 949 (1998). To accomplish those goals, Congress established an integrated scheme of rights, protections, and prohibitions governing employee, employer, and union conduct during organizing campaigns, representation elections, and collective bargaining. Congress also created a centralized administrative agency, the Board, to interpret and administer the NLRA and to resolve labor disputes. See 29 U.S.C. 153-154, 160; *Garner* v. *Teamsters, Local Union No. 776*, 346 U.S. 485, 490 (1953).

The NLRA protects employees' rights to join or to decline to join a union, and it provides a mechanism for peacefully and expeditiously resolving questions concerning union representation. See *Boire* v. *Greyhound Corp.*, 376 U.S. 473, 476-479 (1964). Section 7 of the NLRA sets forth the core rights of employees "to self-organization"; "to form, join, or assist labor organizations"; "to bargain collectively"; and "to engage in other concerted activities"; as well as the right "to refrain from any or all of such activities." 29 U.S.C. 157. Section 8 defines and prohibits union and employer "unfair labor practices" that infringe on employees' Section 7 rights, 29 U.S.C. 158, and Section 10 authorizes the Board to adjudicate unfair labor practice claims, see 29 U.S.C. 160.

Section 9 authorizes the Board to regulate representation elections. It sets forth procedures for determining whether a majority of employees in an appropriate bargaining unit desire to exercise their rights to bargain collectively and for certifying election results. 29 U.S.C. 159. Pursuant to Section 9, the Board has determined

that a secret-ballot election is the preferred method for resolving representational disputes because it best protects employee free choice. See 29 U.S.C. 159(c) and (e); *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 602 (1969); *Dana Corp.*, 351 N.L.R.B. No. 28 (Sept. 29, 2007), slip op. 5-7.

The NLRA encourages the free flow of information from both unions and employers to employees as they consider whether to be represented by a union. Although the Board initially took the position that Section 8 of the NLRA demanded complete employer neutrality during organizing campaigns, see, *e.g.*, *Letz Mfg. Co.*, 32 N.L.R.B. 563, 571-572 (1941), this Court held that Section 8 prohibits only coercive employer speech, see *NLRB* v. *Virginia Elec. & Power Co.*, 314 U.S. 469, 477 (1941). Congress then amended the NLRA to "insure both to employers and labor organizations full freedom to express their views to employees on labor matters." S. Rep. No. 105, 80th Cong., 1st Sess. 23-24 (1947). In particular, Congress added Section 8(c), which provides: "The expressing of any views, argument, or opinion, or the dissemination thereof * * * shall not constitute or be evidence of an unfair labor practice * * * if such expression contains no threat of reprisal or force or promise of benefit." 29 U.S.C. 158(c). Section 8(c) thus "manifests a congressional intent to encourage free debate on issues dividing labor and management." *Linn* v. *United Plant Guard Workers, Local 114*, 383 U.S. 53, 62 (1966).

b. "[I]n passing the NLRA Congress largely displaced state regulation of industrial relations." *Wisconsin Dep't of Indus.* v. *Gould Inc.*, 475 U.S. 282, 286 (1986) (*Gould*). The NLRA's regulatory scheme combines prescriptive rules prohibiting or requiring certain

conduct and market freedom rules defining areas left unregulated for policy reasons. See *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U.S. 724, 748-749 (1985). This Court has recognized distinct NLRA preemption principles to reflect both features of the statutory scheme.

The first principle—enunciated in *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959) (*Garmon* preemption)—is that States may not regulate "activity that the NLRA protects, prohibits, or arguably protects or prohibits," because "'conflict is imminent' whenever 'two separate remedies are brought to bear on the same activity.'" *Gould*, 475 U.S. at 286 (citation omitted); see *Garmon*, 359 U.S. at 244. *Garmon* preemption preserves the jurisdiction of the Board by precluding States from regulating the same conduct that Congress intended the Board to regulate under uniform national law. *Garmon*, 359 U.S. at 242-244; see *Gould*, 475 U.S. at 286.

The second principle—recognized in *Lodge 76, International Ass'n of Machinists* v. *Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976) (*Machinists* preemption)—is that States may not regulate conduct that "Congress intended * * * 'to be controlled by the free play of economic forces.'" *Id.* at 140 (citation omitted). *Machinists* preemption preserves Congress's "intentional balance between the uncontrolled power of management and labor to further their respective interests." *Building & Constr. Trades Council* v. *Associated Builders & Contractors of Mass./R.I., Inc.*, 507 U.S. 218, 226 (1993) (*Boston Harbor*) (internal quotation marks omitted).

2. In September 2000, California enacted Assembly Bill No. 1889, Cal. Gov't Code §§ 16645-16649 (A.B.

1889),[1] which prohibits entities that receive state funds from using the funds to "assist, promote, or deter union organizing." The statute's stated "policy" is to prevent "interfere[nce] with an employee's choice about whether to join or to be represented by a labor union" by "prohibit[ing] an employer from using state funds and facilities for the purpose of influencing employees to support or oppose unionization." 2000 Cal. Stat. ch. 872, § 1.

The prohibition on "assist[ing], promot[ing], or deter[ring] union organizing" is expansively defined to include "*any* attempt by an employer to influence the decision of its employees" regarding "[w]hether to support or oppose a labor organization" or "[w]hether to become a member of any labor organization." Cal. Gov't Code § 16645(a) (emphasis added). The statute's spending restriction applies to "*any* expense, including legal and consulting fees and salaries of supervisors and employees, incurred for * * * an activity to assist, promote, or deter union organizing." *Id.* § 16646(a) (emphasis added). A.B. 1889 exempts certain categories of labor relations expenses from its broad prohibition, including expenses incurred in "[n]egotiating, entering into, or carrying out a voluntary recognition agreement with a labor organization," *i.e.*, expenses incurred in agreeing to recognize a union without a secret-ballot election. *Id.* § 16647(d); see *Linden Lumber Div., Summer & Co.* v. *NLRB*, 419 U.S. 301, 309-310 (1974).

A.B. 1889 contains extensive compliance and enforcement provisions. Entities that receive state funds must "provide a certification to the state that none of the

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[1] Unless otherwise noted, all citations to Cal. Gov't Code §§ 16645-16649 are to the 2008 supplement.

funds will be used" for prohibited expenditures, Cal. Gov't Code §§ 16645.2(c), 16645.7(b). Moreover, the statute places the burden on recipients to "maintain records sufficient to show that no state funds were used" for prohibited expenditures, *id.* §§ 16645.2(c), 16645.7(c), and conclusively presumes that any expenditure to assist, promote, or deter union organizing made from commingled funds constitutes a violation of the statute, *id.* § 16646(b). Suspected violators may be sued by the state Attorney General or any private taxpayer for injunctive relief, mandatory damages and civil penalties, attorney's fees, and costs. See *id.* §§ 16645.2(d), 16645.7(d), 16645.8.

At issue here are the portions of A.B. 1889 regulating spending by any private employer that receives either "a grant of state funds," Cal. Gov't Code § 16645.2(a), or more than $10,000 per year "on account of its participation in a state program," *id.* § 16645.7(a). One "program" at issue is Medi-Cal, California's Medicaid program of health benefits coverage for low-income individuals, under which participating healthcare providers receive state funds as "reimbursement for services provided to beneficiaries." J.A. 110-111, 129-131; see, *e.g.*, California Dep't of Health Care Servs. (DHCS), *Medi-Cal Rates Information* (visited Jan. 16, 2008) <http://files.medi-cal.ca.gov/pubsdoco/rates/rateshome.asp> (listing reimbursement rates for various medical procedures). For example, long-term-care providers regularly submit reports of "allowable costs" to the State, which sets Medi-Cal reimbursement rates (generally a fixed amount per day per beneficiary) relying in part on those cost reports. See J.A. 244-245, 248-255; see also Cal. Welf. & Inst. Code §§ 14126.02, 14126.023 (West Supp. 2007); see generally DHCS, *Methods and Stan-*

dards for Establishing Facility-Specific Reimbursement Rates (Aug. 1, 2005) <www.dhs.ca.gov/mcs/mcpd/RDB/LTCSDU/pdfs/SPA%2004012%202105.pdf>. Under the Medi-Cal program, "allowable costs do not include expenditures to assist, promote, or deter union organizing to the extent such expenditures are paid by the provider with State funds." J.A. 244-245; see J.A. 248-251. A.B. 1889 supplements that restriction by "regulat[ing] the manner in which Medi-Cal providers may spend state funds" once they have received those funds from the State as payment for services rendered. J.A. 331-332; see J.A. 323-324.

3. Petitioners challenged A.B. 1889 in federal district court, alleging that the statute is preempted by the NLRA under both *Machinists* and *Garmon*. The district court granted summary judgment for petitioners. Pet. App. 140a-149a. It held that A.B. 1889's restrictions on grant and program funds are preempted under *Machinists* because the NLRA "manifests a congressional intent to encourage free debate on issues dividing labor and management," *id.* at 146a (quoting *Linn*, 383 U.S. at 62), and A.B. 1889 "prevent[s] this free debate" by "regulat[ing] employer speech about union organizing," *id.* at 147a. The court rejected respondents' contention that A.B. 1889 is a permissible means of "controlling the use of state funds" as a "'market participant,'" because the statute is "a traditional legislative enactment, not a proprietary act." *Id.* at 147a-148a (citation omitted).

4. a. A panel of the court of appeals affirmed, both in an initial opinion, Pet. App. 114a-139a, and in a second opinion after granting panel rehearing, *id.* at 58a-113a. The court of appeals then granted en banc review and reversed and remanded. *Id.* at 1a-57a.

At the outset, the en banc court rejected respondents' argument that A.B. 1889 is proprietary, rather than regulatory, in nature. Pet. App. 7a-12a. The court noted that "[t]he statute on its face does not purport to reflect California's interest in the efficient procurement of goods and services"; instead, it indicates "a general state position of neutrality with regard to organizing" and a desire to impact "an employer's attempt to influence employee choice about whether to join a union." *Id.* at 11a-12a.

Despite A.B. 1889's regulatory purpose, the court of appeals concluded that the statute's grant and program restrictions "do not undermine federal labor policy." Pet. App. 3a. The court held that *Machinists* preemption does not apply because employer speech regarding union organizing is not free from "*all* regulation." *Id.* at 19a-21a. The court also found that A.B. 1889 "do[es] not interfere" with an employer's ability to speak to employees during organizing campaigns because "an employer has and retains the freedom to spend its own funds however it wishes." *Id.* at 17a.

The court found *Garmon* preemption inapplicable as well, reasoning that while Section 8(c) "prohibits sanctioning employers" for "exercis[ing] speech rights," it "does not *grant* employers speech rights." Pet. App. 23a. The court also decided that there was "no potential overlap between the [Board's] jurisdiction and that of a state court hearing a suit brought under AB 1889," *id.* at 29a-30a, and that, in any event, California's substantial interest "in determining how the recipients of state grant and program funds use those funds" saves A.B. 1889 from preemption. *Id.* at 30a.

b. Three judges dissented. They explained that "AB 1889 prohibits not just the use of state money granted to

an employer for and under a specific program"; it also restricts how state funds may be used even after an employer has "fully performed" its obligation to the State and the funds "can no longer be considered 'state funds.'" Pet. App. 36a-39a (Beezer, J., dissenting). They concluded that A.B. 1889 is preempted under *Machinists* because the NLRA generally "takes a *laissez faire* approach to employee and employer speech, allowing passionate, partisan debate * * * during a union organizing campaign," and A.B. 1889 interferes with that unregulated zone. *Id.* at 48a-49a, 53a. And they found A.B. 1889 preempted under *Garmon* because it "stifles employer speech rights" that are protected by Section 8(c) of the NLRA and guarded by the Board. *Id.* at 51a, 53a.

SUMMARY OF ARGUMENT

The NLRA establishes a comprehensive, nationally uniform scheme for ensuring efficient and fair representation elections. Congress has determined that both unions and employers should be permitted wide berth to speak with employees about the advantages and disadvantages of unionization in order to enhance employee free choice and foster fair representation elections, and it made that policy choice explicit in Section 8(c) of the NLRA. At the same time, Congress recognized that union and employer speech may be regulated in limited circumstances, and it entrusted that regulation to the Board.

A.B. 1889 intrudes on that comprehensive federal scheme by penalizing employers who speak about unionization. It broadly prohibits any employers that receive state grant or program funds from using such funds to "assist, promote, or deter union organizing," Cal. Gov't

Code §§ 16645.2, 16645.7, based on the State's expressly stated view that employer speech "interfere[s] with an employee's choice about whether to join or to be represented by a labor union," 2000 Cal. Stat. ch. 872, § 1. That policy judgment is directly contrary to Congress's judgment in the NLRA that robust employer speech enhances employee choice and contributes to fair elections. Because it penalizes speech that Congress intended be left unregulated, A.B. 1889 is preempted under *Machinists*. Further, because it intrudes upon the Board's generally exclusive jurisdiction to define the contours of speech that may be regulated, A.B. 1889 is preempted under *Garmon*.

A.B. 1889 is not saved from preemption merely because the State has regulated using its spending power. As the court of appeals correctly noted, A.B. 1889 is plainly regulatory in nature, and its broad scope and punitive enforcement provisions make clear it cannot be justified as the act of a "market participant." Although a State may choose to purchase only certain products or services or fund only a particular message, it may not use its spending power to implement its own labor relations policy, which is precisely what California has attempted here.

The comprehensiveness and exclusivity of the federal scheme are clear. A.B. 1889 poses a serious threat to the uniform federal policy of robust union and employer speech during organizing campaigns, and it intrudes on a core function of the Board. It is therefore preempted.

ARGUMENT

THE NLRA PREEMPTS CALIFORNIA'S STATUTE PROHIBITING EMPLOYERS FROM USING STATE GRANT AND PROGRAM FUNDS TO EXPRESS VIEWS REGARDING UNIONIZATION

It has long been recognized that a state law that stands "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" is preempted. *Nash* v. *Florida Indus. Comm'n*, 389 U.S. 235, 240 (1967) (internal quotation marks omitted). In applying that principle in the labor-relations context, this Court has developed two distinct but complementary preemption doctrines, the *Garmon* and *Machinists* doctrines. Because A.B. 1889 regulates both speech that Congress intended be left unregulated and speech that Congress intended the Board alone to regulate, it is preempted under both doctrines.

A. A.B. 1889 Is Preempted Under *Machinists* Because It Regulates Employer Speech That Congress Intended Be Left Unregulated

In silencing employers while permitting unions to speak to employees, A.B. 1889 tilts the balance in favor of unions during organizing campaigns, contrary to the general federal policy of non-interference with both union and employer speech. It is therefore preempted under the *Machinists* doctrine. In declining to find A.B. 1889 preempted under *Machinists*, the court of appeals manifested an exceedingly narrow and incorrect view of that doctrine.

1. The NLRA leaves unregulated most employer speech during organizing campaigns

The NLRA evidences a clear federal policy that employer speech during union organizing campaigns must generally be left unregulated. Congress decided that both unions and employers should be free to speak with employees about the advantages and disadvantages of unionization, and it added Section 8(c) to the NLRA to ensure that both unions and employers had "full freedom to express their views." S. Rep. No. 105, 80th Cong., 1st Sess. 23 (1947). As this Court has explained, in enacting Section 8(c), Congress intended to foster "uninhibited, robust, and wide-open" debate. *Linn*, 383 U.S. at 62 (internal quotation marks omitted).

Congress's policy choice reflects its view that robust debate assists employees in making informed choices about representation. See *Healthcare Ass'n of N.Y. State, Inc.* v. *Pataki*, 471 F.3d 87, 98-99 (2d Cir. 2006); *NLRB* v. *Lenkurt Elec. Co.*, 438 F.2d 1102, 1108 (9th Cir. 1971). It also recognizes that an employer has an independent interest in conveying its views to employees during unionization drives, because the choice of a union places certain statutory obligations on, and may have significant economic consequences for, the employer. See, *e.g.*, *NLRB* v. *Katz*, 369 U.S. 736, 742-743 (1962); *Tri-Cast, Inc.*, 274 N.L.R.B. 377, 377-378 (1985).

Under the NLRA, "an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union," so long as the communications do not contain a "threat of reprisal or force or promise of benefit." *Gissel Packing Co.*, 395 U.S. at 618. An employer may, for example, "point to a union's past failures and * * * use them to encourage employees to vote against

the union, just as a union may use its past success to encourage employees to support it." *Smithfield Foods, Inc.*, 347 N.L.R.B. No. 109 (Aug. 31, 2006), slip op. 2, aff'd *sub nom. UFCW Local 204* v. *NLRB*, 506 F.3d 1078 (D.C. Cir. 2007). An employer may also inform employees if certain customers are likely to react unfavorably to their choice of a union, see, *e.g.*, *TNT Logistics N. Am., Inc.*, 345 N.L.R.B. No. 21 (Aug. 26, 2005), slip op. 290-292, or if union tactics have previously harmed relationships with customers. See, *e.g.*, *Children's Ctr. for Behavioral Dev.*, 347 N.L.R.B. No. 3 (May 15, 2006), slip op. 1-3. Conversely, an employer may wish to express its view that a certain union has a track record of "responsible and intelligent" representation. *Coamo Knitting Mills, Inc.*, 150 N.L.R.B. 579, 581 n.2, 589, 595 (1964). There are thus myriad perspectives that an employer could offer its employees regarding unionization, and Congress has "firmly established" the employer's right to share those views. *Gissel Packing Co.*, 395 U.S. at 617.

Although debate regarding unionization "may well include vehement, caustic, and sometimes unpleasantly sharp attacks," *Linn*, 383 U.S. at 62 (internal quotation marks omitted), the Board has decided to "leave[] to the good sense of the voters the appraisal of such matters, and to opposing parties the task of correcting inaccurate and untruthful statements." *Stewart-Warner Corp.*, 102 N.L.R.B. 1153, 1158 (1953); see *Trent Tube Co.*, 147 N.L.R.B. 538, 541 (1964). By giving unions and employers wide latitude to express their views and respond to the other party's claims, the NLRA contributes to a sense of fairness during elections and reduces dilatory election-related litigation. See *Midland Nat'l Life Ins.*

Co., 263 N.L.R.B. 127, 131-133 (1982); see also *NLRB* v. *Magnavox*, 415 U.S. 322, 325 (1964).

2. A.B. 1889 is preempted because it restricts employer speech that Congress intended be left unregulated

A.B. 1889 impedes employers from expressing their views regarding unionization, directly contrary to Congress's judgment in the NLRA. It penalizes "any attempt" by an employer "to influence the decision of its employees" regarding "[w]hether to support or oppose" unionization. Cal. Gov't Code § 16645(a)(1). Although most employers are not entirely foreclosed from addressing election issues, any employer that receives grant funds or program funds in excess of $10,000 and engages in any type of communication or activity relating to union representation faces a significant risk of litigation and potential civil penalties. See *id.* §§ 16645.2(d), 16645.7(d), 16645.8. Moreover, entities that can trace all of their receipts to the State, such as several nursing homes and long-term-care facilities that are petitioners in this case, are entirely forbidden from expressing their views or engaging in advocacy efforts regarding unionization. See J.A. 152-154, 165-169, 298-302.

A.B. 1889's broad prohibition on employer speech is based on California's explicit policy judgment that employer speech for or against unionization "interfere[s] with an employee's choice about whether to join or to be represented by a labor union." 2000 Cal. Stat. ch. 872, § 1. That policy stands in stark contrast to Congress's determination, expressed in Section 8(c) of the NLRA, that employer speech enhances employee free choice and contributes to fair elections. See pp. 12-14, *supra*.

Moreover, although A.B. 1889 purports to take a position of neutrality, the statute is far from neutral in its application. A.B. 1889 disrupts the balance struck in the NLRA by impairing speech by employers during union organizing drives, while imposing no restraints on speech by unions, in clear conflict with federal policy. See, *e.g.*, 93 Cong. Rec. 4143 (1947) (in Section 8(c), "the right of employers to express their opinions in labor disputes is made coextensive with the rights which labor unions enjoy") (statement of Sen. Ellender).

A.B. 1889 does not even apply its constraints on employer speech uniformly. Rather than forbidding use of state funds for *all* employer advocacy regarding unionization, A.B. 1889 permits use of state funds for *select* employer advocacy activities that are favored by the State. For example, A.B. 1889 allows employers to use funds received from the State to grant recognition voluntarily without a secret-ballot election, thereby weakening the safeguard that the Board has determined (see pp. 2-3, *supra*) best protects employee free choice with respect to union representation. See Cal. Gov't Code § 16647(d). By encouraging regulated employers to grant recognition without an election, while making it difficult or impossible for them to participate meaningfully in an election if one is held, A.B. 1889 further upsets the balance struck by the NLRA and denies employers "'a weapon that Congress meant [them] to have available.'" *Machinists*, 427 U.S. at 150 (citation omitted).

In the short time since its enactment, A.B. 1889 has already had a significant effect on labor relations in California. Almost immediately, "unions began writing to the California Attorney General's office, alleging violations of the statute in an effort to coerce employers to

abstain from distributing literature, retaining consultants and legal counsel, or otherwise communicating with employees about the advantages and disadvantages of employment in a union shop." Pet. App. 46a (Beezer, J., dissenting); see, *e.g.*, J.A. 170-183. One union, for example, "alleged a violation of the statute, with little factual support, but offered to 'settle' the alleged violation if the employer agreed to enter into a neutrality agreement with the union." Pet. App. 46a (Beezer, J., dissenting). At the same time, the state Attorney General has aggressively enforced A.B. 1889. See, *e.g.*, J.A. 149-151. The record thus makes clear that A.B. 1889 has permitted unions to "gain a special advantage in labor disputes" in California. Pet. App. 46a (Beezer, J., dissenting).

A.B. 1889 seeks to advance California's stated position favoring employer neutrality on the subject of unionization, a position that is contrary to the policy expressed in Section 8(c) of the NLRA, which refuses to put such a thumb on the scales. By using its spending power to discourage advocacy by employers during unionization drives, California has upset "Congress' intentional balance between the uncontrolled power of management and labor to further their respective interests." *Boston Harbor*, 507 U.S. at 226 (internal quotation marks omitted). A.B. 1889 is therefore preempted under the *Machinists* doctrine.

3. *The court of appeals' proffered grounds for distinguishing* Machinists *are unpersuasive*

a. The court of appeals erred in concluding that A.B. 1889 "do[es] not interfere with an employer's ability to engage in 'self-help'" because the employer "retains the freedom to spend its own funds however it wishes." Pet.

App. 17a. A.B. 1889 wholly precludes some entities from exercising their Section 8(c) rights to communicate with their employees regarding unionization. See, *e.g.*, J.A. 152-154. And A.B. 1889 has considerably more than an "incidental" effect (Pet. App. 18a & n.10) on employers that receive funds from sources other than the State. Any time such an employer communicates about or engages in any other activities related to unionization, it risks triggering a state investigation and state-court litigation instigated by the State or by private parties. That litigation could result in substantial financial liability whenever the employer fails to show that "state" funds were not used for unionization-related activities, or has commingled other funds with moneys received from the State. See Cal. Gov't Code §§ 16645.2, 16645.7, 16645.8. Several employers have already felt the effects of A.B. 1889, as labor unions have begun taking full advantage of A.B. 1889's broad applicability and punitive sanctions. See pp. 15-16, *supra*.

Contrary to the court of appeals' suggestion (Pet. App. 17a), employers are not free under A.B. 1889 to spend their "own funds" as they wish, because A.B. 1889's limitations on employer speech are not limited to state grants, but continue to apply to "state" funds even after those funds have been paid by the State to program participants in exchange for services rendered. See pp. 32-33, *infra*. Thus, the State seeks to advance its labor policy views not only through funds it has gratuitously provided but also through funds for which the State has already received fair value in exchange. The State's labor policy, of course, expressly conflicts with the policy embraced by Congress, and so must yield.

b. The court of appeals likewise erred in deeming *Machinists* inapplicable on the ground that "employer

speech in the context of organizing" is not a "zone[] of activity" that Congress left free from "*all* regulation." Pet. App. 19a; see also *id.* at 21a. *Machinists* preemption operates within a framework of extensive Board regulation of numerous aspects of the management-labor relationship. If *Machinists* preemption only operated with respect to categories of conduct devoid of any regulation, it would have little scope. In reality, *Machinists* applies in areas in which Congress has broadly defined protected and unprotected activities and has empowered the Board to define the contours of those activities, as long as the "particular activity" at issue is an activity that Congress has "deemed privileged against state regulation." 427 U.S. at 141 (citation omitted).

In *Machinists* itself, for example, this Court held that state law was preempted even though the general "zone of activity" at issue—the use of economic weapons in labor disputes—was the subject of extensive regulation under the NLRA. Congress had proscribed the use of some economic weapons, left others unregulated, and authorized the Board to draw lines consistent with the statute. See 29 U.S.C. 158(b)(4); *NLRB* v. *Insurance Agents' Int'l Union*, 361 U.S. 477, 490 (1960). The *particular* economic weapon at issue, however—a concerted refusal to work overtime aimed at pressuring an employer in a collective bargaining dispute—had been left *unregulated*, and therefore could not be regulated by the States without impermissibly "'denying one party to an economic contest a weapon that Congress meant him to have available.'" *Machinists*, 427 U.S. at 150 (citation omitted); see *id.* at 142-151; see also *Garner*, 346 U.S. at 499-500 ("The detailed prescription of a procedure for restraint of specified types of picketing would seem to

imply that other picketing is to be free of other methods and sources of restraint. * * * For a state to impinge on the area of labor combat designed to be free is * * * an obstruction of federal policy.").

Congress made a similar determination in the context of union and employer speech during organizing campaigns, deciding that the vast majority of speech must remain unregulated, while authorizing the Board to demarcate the narrow zone of regulation required to ensure free and fair elections. The court of appeals therefore erred, and departed from this Court's precedents, in holding that *Machinists* does not apply here.

c. The court below also erred in deeming *Machinists* principles inapplicable on the ground that Congress has, in limited contexts, restricted entities receiving federal funds from spending those funds on union-related activities. See Pet. App. 20a. Pointing out Congress's authority to modify broad federal policy to tailor it to specific contexts does little to strengthen the claim of the States to avoid the preemptive force of federal laws. Cf. U.S. Const. Art. VI, Cl. 2. Unlike the States, Congress has authority to create tailored exceptions to otherwise applicable federal labor policies, and (also unlike the States) it can do so in a manner that preserves national uniformity without creating the risk of a 50-State patchwork of inconsistent labor policies. The fact that Congress has chosen to impose targeted federal restrictions on employer speech regarding unionization in certain limited contexts thus does not suggest that the States are somehow vested with authority to have their own disparate policy views override federal labor policy in other settings. If anything, those context-specific federal restrictions only underscore that this is an area in which federal law is controlling. Indeed, if Congress

had intended to permit *state*-law departures from the general federal policy favoring robust employee speech, it would have said so explicitly. Compare *Golden State Transit Corp.* v. *City of L.A.*, 475 U.S. 608, 617 (1986) (no evidence that Congress contemplated state regulation), with *De Veau* v. *Braisted*, 363 U.S. 144, 154-155 (1960) (permitting state regulation where "Congress expressly gave its consent" to such regulation).

In purpose and effect, moreover, A.B. 1889 is more directly at odds with federal labor policy than the cited federal statutes. None of those statutes is government-wide in scope, and none is directed solely at prohibiting the use of funds to assist, promote, or deter union organizing; instead, they authorize grants or payments for specific purposes and then provide illustrations of activities that are not germane to those purposes. They represent a balancing of competing objectives for specific federal programs, not a government-wide frontal assault on existing federal labor policy. See, *e.g.*, Workforce Investment Act, 29 U.S.C. 2852, 2854(b)(4), (c)(6)(B) and (C), 2864, 2931(b)(7), (c), (d)(1), (d)(2) and (e), 2938(a)(3) (authorizing grants for job training and related activities but limiting spending to specified programs and activities and specifying various prohibited uses of funds); National and Community Service Act, 42 U.S.C. 12521-12526, 12530, 12571-12576, 12584(a), 12634 (authorizing grants for qualifying national and community service programs and delineating restrictions on uses of funds); Head Start Act, 42 U.S.C. 9833-9835, 9839-9840 (2000 & Supp. IV 2004) (establishing program to promote school readiness for low-income children and imposing restrictions on how funds may be used); Medicare Act, 42 U.S.C. 1395d-1395g, 1395k-1395n, 1395x(v) (2000 & Supp. IV 2004) (establishing health care pro-

grams for elderly and disabled citizens and specifying numerous limitations on reimbursable costs).

Moreover, none of the cited federal statutes contains express pro-unionization exemptions like those included in A.B. 1889. See Cal. Gov't Code § 16647. The limited restrictions in certain federal programs thus provide no basis for States to intrude on the exclusive federal labor-relations scheme in other contexts where Congress has authorized no such intrusions.

B. A.B. 1889 Is Preempted Under *Garmon* Because It Regulates Speech Prohibited Under The NLRA And Intrudes On The Board's Exclusive Primary Jurisdiction

A.B. 1889 is also preempted under *Garmon* because, in addition to regulating employer speech that Congress deliberately left unregulated, it regulates coercive or prejudicial employer speech for reasons of labor policy, a function that Congress assigned exclusively to the Board.

1. The NLRA prohibits certain speech and entrusts enforcement of that prohibition to the Board

Although Congress has generally decided that employer speech regarding unionization should be unregulated, it has recognized that regulation may be required in certain circumstances to protect employee free choice and ensure fair elections, and it has entrusted that regulation to the Board. First, Congress prohibited coercive employer speech as an unfair labor practice under Section 8 of the NLRA. See 29 U.S.C. 158(a)(1) (unfair labor practice for employer to "coerce employees in the exercise of the rights guaranteed in [Section 7]"); 29 U.S.C. 158(c) (employer's "expressi[on] of any views, argument, or opinion" protected from challenge only if it "contains no threat of reprisal or force or promise of

benefit"). For example, although an employer may "tell [employees] what he reasonably believes will be the likely economic consequences of unionization," he may not make "'threats of economic reprisal to be taken solely on his own volition.'" *Gissel Packing Co.*, 395 U.S. at 619 (citation omitted).

In Section 9 of the NLRA, moreover, Congress authorized the Board to regulate speech that may prejudice a representation election. See 29 U.S.C. 159. The Board may regulate election-related speech that "creates an atmosphere which renders improbable a free choice," even if the speech "may not constitute an unfair labor practice." *General Shoe Corp.*, 77 N.L.R.B. 124, 126 (1948). For example, an employer may not "express his anti-union views to the employees on the day before the election" by "br[inging] [them] to his own office in some 25 groups of 20 to 25 individuals" or "instruct [his] foremen to propagandize employees in their homes." *Ibid.* More generally, the Board has long administered time, place, and manner restrictions that bar employer and union campaign activities in the vicinity of the polls or during the final hours before an election. See, *e.g.*, *Michem, Inc.*, 170 N.L.R.B. 362, 362-363 (1968); *Peerless Plywood Co.*, 107 N.L.R.B. 427, 429-430 (1953).

Congress committed regulation of coercive and prejudicial speech regarding unionization to the Board. The Board has the exclusive responsibility for administering the unfair-labor-practice provisions of the NLRA, see 29 U.S.C. 160(a), as well as the exclusive authority for overseeing representation elections and certifying election results, see 29 U.S.C. 159. The Board strives to preserve a careful balance that seeks to deter coercive and prejudicial actions without chilling the open robust debate that Congress has embraced. Preserving that bal-

ance can require drawing fine lines, and that line-drawing is solely a function for the Board. See *NLRB* v. *A.J. Tower Co.*, 329 U.S. 324, 330 (1946). There is no place in the NLRA's comprehensive regulatory scheme for state regulation of employer speech to effectuate state labor policy.

2. A.B. 1889 is preempted because it interferes with the Board's jurisdiction over coercive or prejudicial employer speech regarding unionization

Garmon preemption precludes States from regulating "activity that the NLRA protects, prohibits, or arguably protects or prohibits," *Gould*, 475 U.S. at 286, in order to avoid "conflict with a complex and interrelated federal scheme of law, remedy, and administration" set forth in the NLRA. *Garmon*, 359 U.S. at 243. *Garmon* preemption principles apply to A.B. 1889 because the only employer speech reached by A.B. 1889 that Congress did not exempt from regulation is coercive or prejudicial employer speech during organizing campaigns, and Congress assigned regulatory oversight of such speech to the Board.

A.B. 1889 regulates a broad swath of employer speech regarding unionization—including speech that falls close to, and on either side of, the line drawn by the NLRA—in order to advance California's goal of preventing regulated employers "from seeking to influence employees to support or oppose unionization." 2000 Cal. Stat. ch. 872, § 1. A.B. 1889 also subjects regulated employers to the substantial risk and burden of state investigation, private suits, treble damages, and attorney's fee awards in the event of a violation. See Cal. Gov't Code §§ 16645.2, 16645.7, 16645.8.

A.B. 1889's regulation of employer speech compels state courts to usurp the functions of the Board. The Board has "exclusive primary competence," *Garmon*, 359 U.S. at 245, to distinguish coercive speech that violates Section 8(a)(1) or is prejudicial to a fair election, see *Gissel Packing Co.*, 395 U.S. at 620; *General Shoe Corp.*, 77 N.L.R.B. 124, 126 (1948), from non-coercive speech that enhances employee free choice and is therefore immune from regulation, see 29 U.S.C. 158(c); *Trent Tube Co.*, 147 N.L.R.B. 538, 541 (1964). A.B. 1889 requires state courts to penalize certain employer speech regarding unionization and impose different remedies from those provided in the NLRA. Under the uniform federal standard, only employer speech that coerces employees or prejudices elections may be regulated. See pp. 21-23, *supra*. Under A.B. 1889, by contrast, all advocacy by covered employers regarding unionization is regulated—albeit on a different axis, namely source of funds—on the theory that it inherently interferes with employee free choice. See 2000 Cal. Stat. ch. 872, § 1.

Sanctions for violations of the NLRA are entirely remedial, see *Gould*, 475 U.S. at 288 n.5, and include re-running a tainted election, directing an employer to cease and desist from an unfair labor practice, and posting appropriate remedial notices to employees. See, *e.g.*, *National By-Products, Inc.* v. *NLRB*, 931 F.2d 445, 447-448, 450-452 (7th Cir. 1991). Sanctions for violations of A.B. 1889, on the other hand, are punitive in nature. See Cal. Gov't Code §§ 16645.2(d), 16645.7(d), 16645.8. As this Court recognized in *Gould*, "'conflict is imminent' whenever 'two separate remedies are brought to bear on the same activity,'" and the States are therefore barred "from providing their own regulatory or judicial reme-

dies for conduct prohibited or arguably prohibited by the Act." *Id.* at 286 (citation omitted).

The court of appeals suggested (Pet. App. 28a) that suit under A.B. 1889 would not interfere with the Board's jurisdiction because the only issue would be "whether an employer used state grant or program funds to influence employees, not whether that attempt violated the NLRA." That suggestion overlooks the fact that A.B. 1889 penalizes employers based on the policy judgment that all employer speech regarding unionization interferes with employee free choice, a judgment contrary to the NLRA. Further, the subject matter of all suits under A.B. 1889 is an employer's expression of its views regarding unionization, and Congress has determined that such speech, if regulated at all, is to be regulated exclusively by the Board.

To be sure, the case for *Garmon* preemption would be even stronger if California law imposed a test of coercion different from the federal test or imposed different sanctions solely because the federal test was satisfied. But because much of A.B. 1889 is preempted under *Machinists* principles, a state court considering an A.B. 1889 claim would have to attempt to discern whether employers engaged in coercive or prejudicial speech (or to use the court of appeals' phrase, "violated the NLRA") as part of the preemption analysis—the same analysis undertaken by the Board. That is, before a state court could conclude that certain employer speech could be penalized under A.B. 1889 consistent with *Machinists*, the court would have to first conclude that the speech at issue does not fall within the category of speech that Congress intentionally left unregulated, *i.e.*, it would have to conclude that the speech was coercive or prejudicial. Any attempt by a state court to perform

that function would intrude on the jurisdiction of the Board and upset the federal remedial scheme.

Accordingly, to whatever extent it is not preempted by *Machinists*, A.B. 1889 is preempted under *Garmon*, because it regulates employer speech that the NLRA "prohibits, or arguably * * * prohibits," *Gould*, 475 U.S. at 286, and intrudes on the Board's jurisdiction to determine whether employer speech regarding union organizing is impermissible.

3. The court of appeals' proffered grounds for distinguishing Garmon *are unpersuasive*

a. The court of appeals erred in finding *Garmon* preemption principles inapplicable to A.B. 1889. First, the court incorrectly focused its attention on the question whether A.B. 1889 regulates employer speech that is protected or affirmatively authorized by the NLRA. Pet. App. 23a-24a (rejecting *Garmon* preemption because "[S]ection 8(c) does not *grant* employers speech rights"); see *Linn*, 383 U.S. at 62 n.5. Regardless of whether Section 8(c) can be read to "grant" employers speech rights within the meaning of *Garmon*, it is clear that Section 8 prohibits coercive employer speech, see, *e.g.*, *Gissel Packing Co.*, 395 U.S. at 619, and that Congress gave the Board the exclusive responsibility for enforcing that prohibition. See 29 U.S.C. 160. Congress also gave the Board the authority to regulate prejudicial speech as part of its exclusive responsibility for overseeing representation elections under Section 9 of the NLRA. See pp. 22-23, *supra*. By permitting state courts to punish speech during representation elections, A.B. 1889 impermissibly intrudes on the jurisdiction of the Board and thus is preempted. See *New York Tel. Co.* v. *New York State Dep't of Labor*, 440 U.S.

519, 528 (1979) ("The overriding interest in a uniform, nationwide interpretation of the federal statute by the centralized expert agency created by Congress * * * demands that the [Board's] primary jurisdiction be protected.").

b. The court of appeals also erred in finding that California's exercise of its spending power falls within the recognized exception to *Garmon* preemption for conduct that is "deeply rooted in local feeling and responsibility." Pet. App. 30a-31a (quoting *Garmon*, 359 U.S. at 243-244). In each of the cases applying that exception, the conduct being regulated by the State—defamatory speech, violence, trespass, obstruction of access to property, intentional infliction of emotional distress—was tortious or criminal conduct that constitutes a traditional core concern of state law. See *Sears, Roebuck & Co.* v. *San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 207 (1978); *Farmer* v. *United Bhd. of Carpenters, Local 25*, 430 U.S. 290, 302-306 (1977); *Linn*, 383 U.S. at 63-641; *International Union, UAW* v. *Russell*, 356 U.S. 634, 644-646 (1958); *Youngdahl* v. *Rainfair, Inc.*, 355 U.S. 131, 139-140 (1957).

In contrast, A.B. 1889 is premised on the State's desire to regulate labor relations, not a concern about protecting its citizens from tortious or criminal conduct. And even assuming *arguendo* that a State's interest in protecting the public fisc could satisfy the "local feeling" exception, A.B. 1889 does not further that interest. See pp. 29-30, 32-33, *infra*; see also *Gould*, 475 U.S. 289. Indeed, A.B. 1889 is the type of targeted state labor-relations law to which *Garmon* preemption principles apply with their "greatest force." *Sears*, 436 U.S. at 193; see *id.* at 197 n.27.

In addition, the "local feeling" exception to *Garmon* applies only if the "harm to the regulatory scheme established by Congress" is outweighed by "the importance of the asserted cause of action to the State as a protection to its citizens," *Local 926, Int'l Union of Operating Eng'rs* v. *Jones*, 460 U.S. 669, 676 (1983). While in many contexts the proper weighing of those factors might prove less than self-evident, cf. *Bendix Autolite Corp.* v. *Midwesco Enters., Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring in the judgment), here the State's asserted interest in furthering its own labor policy causes the balance to tilt strongly in favor of preemption. A.B. 1889 intrudes on the core concerns of the NLRA and core functions of the Board, without furthering any concomitant state interest in public safety. See *Sears*, 436 U.S. at 196-197 (requiring "a significant state interest in protecting the citizen from the challenged conduct" in order to permit state adjudication of a practice arguably within the Board's jurisdiction).[2]

C. The State's Use Of Its Spending Power Does Not Save A.B. 1889 From Preemption

The court of appeals correctly recognized that A.B. 1889 is regulatory, not proprietary, in nature. Yet it

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[2] The court of appeals erred in relying on *Sears* to reject *Garmon* preemption, because unlike the generally applicable state trespass law at issue in *Sears*, 436 U.S. at 188, A.B. 1889 is a targeted state labor-relations law which poses an acute threat to the Board's jurisdiction, see *id.* at 193 & n.21, 197 n.27, without furthering any "significant state interest in protecting [its] citizen." *Id.* at 196-197. Moreover, while this Court found "no risk of overlapping jurisdiction" in *Sears*, 436 U.S. at 201, here, a California court adjudicating an A.B. 1889 claim would consider the same question that Congress entrusted exclusively to the Board (*i.e.*, whether certain employer speech is subject to regulatory burdens). See pp. 25-26, *supra*.

exempted A.B. 1889 from preemption on the ground that a State may control the use of its own funds. That reasoning was erroneous. Although a State may allocate funds for a particular purpose and ensure that the funds are spent only for that purpose, A.B. 1889 is not such a law.

1. California is not acting as a "market participant"

In considering claims of NLRA preemption, this Court has found certain government contract conditions that affect labor to be permissible when the government acts in a proprietary capacity as a "market participant." *Boston Harbor*, 507 U.S. at 227, 229-231. As this Court has explained, the distinction "between government as regulator and government as proprietor" is crucial, because "pre-emption doctrines apply only to state *regulation*." *Id.* at 227.

Here, the court of appeals correctly found (Pet. App. 11a) that A.B. 1889 is "regulatory" and is "not protected by the market participant exception." The statute's stated purpose and effect is to further a labor policy of selective employer silence regarding union organizing, a policy in direct conflict with federal labor policy. See 2000 Cal. Stat. ch. 872, § 1. As the court of appeals recognized, "The statute on its face does not purport to reflect California's interest in the efficient procurement of goods and services" but instead indicates "a general state position * * * with regard to organizing" and a desire to limit "an employer's attempt to influence employee choice about whether to join a union." Pet. App. 11a-12a.[3]

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[3] The court of appeals was correct in recognizing that the statute furthers a general state position on employer speech rather than a

A.B. 1889 upsets the balance struck by the NLRA and applies regulatory pressure in favor of unionization by impeding or silencing employers who would speak about union organizing efforts, while allowing them to use funds received from the State for any other labor costs. For example, A.B. 1889 permits "state" funds to be spent on voluntary recognition agreements, see Cal. Gov't Code § 16647(d), despite an employer's right to require that representational disputes be resolved using a secret ballot. See 29 U.S.C. 159(c) and (e); see also pp. 2-3, *supra*. Moreover, "the essentially punitive rather than corrective nature" of A.B. 1889's comprehensive enforcement scheme underscores its regulatory goal. *Gould*, 475 U.S. at 288 n.5. As a state regulatory measure, A.B. 1889 is subject to the normal standards for *Machinists* and *Garmon* preemption, and, as discussed (see pp. 11-28, *supra*), it is preempted under those standards.[4]

A state regulatory measure cannot escape preemption merely because the State regulates through its spending power. In *Gould*, this Court determined that a state policy of refusing to purchase goods and services

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specific procurement goal, but the court clearly erred in describing that policy as one "of neutrality." Pet. App. 12a; see pp. 15-16, *supra*.

[4] Moreover, having correctly recognized that A.B. 1889 involves regulation, not the State's proprietary role as a market participant, the court of appeals erred in finding *Machinists* preemption inapplicable because the State's spending decisions are not controlled by market forces. The proper place to consider the relevance, if any, of the fact that A.B. 1889 takes the form of a restriction on spending is in the initial consideration of whether it falls within the market participant exception. Having correctly concluded that A.B. 1889 is in substance regulatory, the court of appeals erred in relying on "the state's choices of how to spend its funds" as a basis for rejecting *Machinists* preemption. Pet. App. 17a.

from three-time NLRA violators could not be justified as the action of a market participant when it "serve[d] plainly as a means of enforcing the NLRA." 475 U.S. at 287. The State's invocation of its spending power did not immunize its regulation from preemption, because the choice "to use its spending power rather than its police power d[id] not significantly lessen the inherent potential for conflict" between the state and federal schemes. *Id.* at 289. *Gould* thus teaches that States may not use their spending power in a manner "tantamount to regulation" of labor relations. *Ibid.* Even if the scope of regulation is limited to the use of state funds, such efforts impermissibly "detract[] from the 'integrated scheme of regulation' created by Congress" in the NLRA. *Id.* at 288-289.

Here, just as in *Gould*, the State has attempted to regulate labor relations using its spending power, through a statute that operates in a "rigid and undiscriminating manner," with sanctions that are "essentially punitive rather than corrective." 475 U.S. at 287-288 & n.5. And A.B. 1889 presents an even more stark conflict with federal labor policy than the statute in *Gould*, because it furthers a substantive policy that is contrary to the NLRA *and* imposes additional remedies for violations of the NLRA. See *id.* at 287. Thus, California's invocation of its spending power cannot save its regulation of labor relations from preemption. A.B. 1889 is plainly not an example of a "State act[ing] as a market participant with no interest in setting policy." *Boston Harbor*, 507 U.S. at 229. It is instead a state regulatory measure designed to advance California's chosen labor policies, and it must therefore be judged under the preemption standards applicable to such state regulation. *Id.* at 227.

2. A.B. 1889 is not saved from preemption as a state effort to fund only a particular program

a. Although a State has a legitimate proprietary interest in ensuring that state funds appropriated for a proper purpose are spent in accordance with that purpose, A.B. 1889's restrictions are not of that type. Rather than adopting a neutral affirmative requirement that grant funds may be spent solely for the purposes of the relevant grant program, A.B. 1889 imposes only a negative restriction on the use of funds for employer speech regarding union representation and allows funds to be spent for any other labor costs besides the costs of employer speech regarding union representation. A.B. 1889's grant restrictions operate in a regulatory fashion by targeting a particular category of disfavored employer speech for state-labor-policy reasons, and thus they cannot "even plausibly be defended as a legitimate response to state procurement constraints or to local economic needs." *Gould*, 475 U.S. at 291.

A.B. 1889's restrictions on state program participants also extend beyond any arguably legitimate proprietary interest. For example, California's Medi-Cal program includes detailed rules specifying which costs the State views as reimbursable, ensuring that California reimburses long-term-care providers only for those expenses. See J.A. 243-245, 248-254. A.B. 1889 goes beyond those restrictions by regulating how service providers may use funds received from the State—even after the service has been provided and the funds can no longer be considered "state funds":

> While A.B. 1889 regulates the manner in which Medi-Cal providers may spend state funds, it does not govern which expenditures are used to determine

> the prospective reimbursement rates ultimately set by the state for different classes of Medi-Cal providers statewide. The latter is instead governed by the cost reporting requirements of the State Medicaid Plan.

J.A. 331-332. California has no legitimate *proprietary* interest in controlling what a healthcare provider does with reimbursement payments it has earned by providing covered medical services.

b. Although the court of appeals recognized A.B. 1889's clear regulatory purpose, it found that the statute was not preempted because (in its view) A.B. 1889 does not violate the First Amendment. Pet. App. 32a-35a. Regardless of whether A.B. 1889 violates the First Amendment (an issue that the parties agreed was not presented below, see J.A. 352-353), the question here is a distinct one, namely, whether California's restrictions on employer advocacy regarding unionization impermissibly conflict with federal labor policy and the exclusive jurisdiction of the Board. On that question, the answer is clear. Although a State may "choose[] to fund a program dedicated to advance certain permissible goals," *Rust* v. *Sullivan*, 500 U.S. 173, 194 (1991), it is not "permissible" for a State to regulate labor relations in a manner contrary to the comprehensive federal scheme. See *Gould*, 475 U.S. at 290 ("[W]e cannot believe that Congress intended to allow States to interfere with the 'interrelated federal scheme of law, remedy, and administration,' under the NLRA as long as they did so through exercises of the spending power." (citation omitted)); *NLRB* v. *Nash-Finch Co.*, 404 U.S. 138, 145 (1971) ("The Board is the sole protector of the 'national interest' defined with particularity in the Act.").

Furthermore, A.B. 1889 cannot plausibly be characterized as a "prohibition on a project grantee * * * from engaging in activities outside of the project's scope." *Rust*, 500 U.S. at 194. A.B. 1889 does not provide that funds allocated for a given purpose may be spent only on that purpose; instead, it permits employers to spend state funds on any type of labor-related costs except employer speech during organizing campaigns (and also permits certain expenditures favoring unionization). See pp. 29-33, *supra*.

Federal law accords a well-warranted respect to a State's sovereignty over its own fisc, but the limit of that respect is exceeded when the State seeks to impose regulatory restraints that conflict with fundamental objectives of federal law. The NLRA's policy of employee free choice with respect to selection of a collective bargaining representative is too fundamental to the comprehensive federal scheme to permit States to attach incompatible conditions that frustrate "congressional intent to encourage free debate on issues dividing labor and management," *Linn*, 383 U.S. at 62.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

RONALD MEISBURG
General Counsel
JOHN E. HIGGINS, JR.
Deputy General Counsel
JOHN H. FERGUSON
Associate General Counsel
LINDA DREEBEN
Deputy Associate General Counsel
KYE PAWLENKO
KEVIN FLANAGAN
Attorneys
National Labor Relations Board

PAUL D. CLEMENT
Solicitor General
THOMAS G. HUNGAR
Deputy Solicitor General
NICOLE A. SAHARSKY
Assistant to the Solicitor General

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STATUTORY APPENDIX

1. Section 7 of the National Labor Relations Act, 29 U.S.C. 157, provides:

Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

2. Section 8 of the National Labor Relations Act, 29 U.S.C. 158, provides, in pertinent part:

Unfair labor practices

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

* * * * *

(c) Expression of views without threat of reprisal or force or promise of benefit

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

* * * * *

3. Section 9 of the National Labor Relations Act, 29 U.S.C. 159, provides:

Representatives and elections

(a) Exclusive representatives; employees' adjustment of grievances directly with employer

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

(b) Determination of bargaining unit by Board

The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided*, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

(c) Hearings on questions affecting commerce; rules and regulations

(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in subsection (a) of this section, or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in subsection (a) of this section; or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in subsection (a) of this section;

the Board shall investigate such petition and if it has reasonable cause to believe that a question of represen tation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predeces-

sor not issued in conformity with section 160(c) of this title.

(3) No election shall be directed in any bargaining unit or any subdivision within which in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this subchapter in any election conducted within twelve months after the commencement of the strike. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) of this section the extent to which the employees have organized shall not be controlling.

(d) Petition for enforcement or review; transcript

Whenever an order of the Board made pursuant to section 160(c) of this title is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be in-

cluded in the transcript of the entire record required to be filed under subsection (e) or (f) of section 160 of this title, and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

(e) Secret ballot; limitation of elections

(1) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 158(a)(3) of this title, of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer.

(2) No election shall be conducted pursuant to this subsection in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held.

4. Section 10 of the National Labor Relations Act, 29 U.S.C. 160, provides, in pertinent part:

Prevention of unfair labor practices

(a) Powers of Board generally

The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may

be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith.

* * * * *

5. California Government Code § 16645 (West Supp. 2008) provides:

Definitions

For purposes of this chapter, the following terms have the following meanings:

(a) "Assist, promote, or deter union organizing" means any attempt by an employer to influence the decision of its employees in this state or those of its subcontractors regarding either of the following:

(1) Whether to support or oppose a labor organization that represents or seeks to represent those employees.

(2) Whether to become a member of any labor organization.

(b) "Employer" means any individual, corporation, unincorporated association, partnership, government

agency or body, or other legal entity that employs more than one person in the state.

(c) "State contractor" means any employer that receives state funds for supplying goods or services pursuant to a written contract with the state or any of its agencies. "State contractor" includes an employer that receives state funds pursuant to a contract specified in paragraph (2) of subdivision (d). For purposes of this chapter, the contract shall be deemed to be a contract with a state agency.

(d)(1) "State funds" means any money drawn from the State Treasury or any special or trust fund of the state.

(2) "State funds" includes any money appropriated by the state and transferred to any public agency, including a special district, that is used by the public agency to fund, in whole or in part, a service contract in excess of two hundred fifty thousand dollars ($250,000).

(e) "State property" means any property or facility owned or leased by the state or any state agency.

6. California Government Code § 16645.1 (West Supp. 2008) provides:

Prohibition; requests for reimbursements; records; violations; penalties

(a) No state funds shall be used to reimburse a state contractor for any costs incurred to assist, promote, or deter union organizing.

(b) Every request for reimbursement from state funds by a state contractor shall include a certification that the contractor is not seeking reimbursement for costs incurred to assist, promote, or deter union organizing. A state contractor that incurs costs to assist, promote, or deter union organizing shall maintain records sufficient to show that no reimbursement from state funds has been sought for those costs. The state contractor shall provide those records to the Attorney General upon request.

(c) A state contractor is liable to the state for the amount of any funds obtained in violation of subdivision (a) plus a civil penalty equal to twice the amount of those funds.

(d) This section does not apply to a fixed-price contract or to any other arrangement by which the amount of the payment of state funds does not depend on the costs incurred by the state contractor.

7. California Government Code § 16645.2 (West Supp. 2008) provides:

Grant recipients; accounting for use of state funds; violations; penalties

(a) The recipient of a grant of state funds, including state funds disbursed as a grant by a public agency, shall not use the funds to assist, promote, or deter union organizing.

(b) For purposes of this section, each recipient of a grant of state funds shall account for those funds as follows:

(1) State funds designated by the grantor for use for a specific expenditure of the recipient shall be accounted for as allocated to that expenditure.

(2) State funds that are not designated as described in paragraph (1) shall be allocated on a pro rata basis to all expenditures by the recipient that support the program for which the grant is made.

(c) Prior to the disbursement of a grant of state funds, the recipient shall provide a certification to the state that none of the funds will be used to assist, promote, or deter union organizing. Any recipient that makes expenditures to assist, promote, or deter union organizing shall maintain records sufficient to show that state funds have not been used for those expenditures. The grant recipient shall provide those records to the Attorney General upon request.

(d) A grant recipient is liable to the state for the amount of any funds expended in violation of subdivision (a) plus a civil penalty equal to twice the amount of those funds.

8. California Government Code § 16645.3 (West Supp. 2008) provides:

State contractors; prohibitions; service contracts for state or state agencies; violations; penalties

(a) No state contractor shall assist, promote, or deter union organizing by employees who are performing work on a service contract, including a public works contract, for the state or a state agency.

(b) A state contractor that violates subdivision (a) is liable for a civil penalty of one thousand dollars ($1,000) per employee per violation.

9. California Government Code § 16645.4 (West Supp. 2008) provides:

State contractors in receipt of state funds in excess of a certain amount pursuant to contracts with state or state agencies; prohibition; records; violations; penalties

(a) A state contractor that receives state funds in excess of fifty thousand dollars ($50,000) pursuant to a contract with the state or a state agency shall not use those state funds to assist, promote, or deter union organizing during the life of the contract, including any extensions or renewals of the contract. The dollar threshold in this subdivision, however, does not limit the application of other provisions of this chapter that restrict the use of state funds.

(b) All contracts in excess of fifty thousand dollars ($50,000) and that are awarded by the state or a state agency shall contain the prohibition stated in subdivision (a).

(c) A state contractor who is subject to subdivision (a) and who makes expenditures to assist, promote, or deter union organizing shall maintain records sufficient to show that no state funds were used for those expenditures. The state contractor shall provide those records to the Attorney General upon request.

(d) A state contractor is liable to the state for the amount of any funds expended made in violation of sub-

division (a) plus a civil penalty equal to twice the amount of those funds.

10. California Government Code § 16645.5 (West Supp. 2008) provides:

Employers conducting business on state property pursuant to contracts or concession agreements; meeting prohibitions; violations; penalties

(a) An employer conducting business on state property pursuant to a contract or concession agreement with the state or a state agency, or a subcontractor on such a contract or agreement, shall not use state property to hold a meeting with any employees or supervisors if the purpose of the meeting is to assist, promote, or deter union organizing. This section does not apply if the state property is equally available, without charge, to the general public for holding a meeting.

(b) An employer that violates subdivision (a) shall be liable to the state for a civil penalty equal to one thousand dollars ($1,000) per employee per meeting.

11. California Government Code § 16645.6 (West Supp. 2008) provides:

Public employers receiving state funds; prohibition; violations

(a) A public employer receiving state funds shall not use any of those funds to assist, promote, or deter union organizing.

(b) Any public official who knowingly authorizes the use of state funds in violation of subdivision (a) shall be liable to the state for the amount of those funds.

12. California Government Code § 16645.7 (West Supp. 2008) provides:

Private employers receiving state funds in excess of a certain amount; certification requirements; records; violations; penalties

(a) A private employer receiving state funds in excess of ten thousand dollars ($10,000) in any calendar year on account of its participation in a state program shall not use any of those funds to assist, promote, or deter union organizing.

(b) As a condition of participating in a state program pursuant to which it will receive state funds in excess of ten thousand dollars ($10,000) in any calendar year, a private employer shall provide a certification to the state that none of those funds will be used to assist, promote, or deter union organizing.

(c) A private employer who is subject to subdivision (a) and who makes expenditures to assist, promote, or deter union organizing shall maintain records sufficient to show that no state funds were used for those expenditures. The private employer shall provide those records to the Attorney General upon request.

(d) A private employer is liable to the state for any funds expended in violation of subdivision (a) plus a civil penalty equal to twice the amount of those funds.

13. California Government Code § 16645.8 (West Supp. 2008) provides:

Prosecution of civil actions; notice requirements; intervention; attorney's fees and costs

(a) A civil action for a violation of this chapter may be brought by the Attorney General, or by any state taxpayer, on behalf of the people of the State of California, for injunctive relief, damages, civil penalties, and other appropriate equitable relief. All damages and civil penalties collected pursuant to this chapter shall be paid to the State Treasury.

(b) Before filing an action under this section, a taxpayer shall give written notice to the Attorney General of the alleged violation and the intent to bring suit. If the Attorney General commences a civil action for the same alleged violation within 60 days of receiving the notice, a separate action by the taxpayer shall be barred.

(c) A taxpayer may intervene as a plaintiff in any action brought under this section.

(d) A prevailing plaintiff in any action under this section is entitled to recover reasonable attorney's fees and costs. A prevailing taxpayer intervenor who makes a substantial contribution to an action under this section is entitled to recover reasonable attorney's fees and costs.

14. California Government Code § 16646 (West Supp. 2008) provides:

Treatment of expenditures; accounting for expenditures

(a) For purposes of this chapter, any expense, including legal and consulting fees and salaries of supervisors and employees, incurred for research for, or preparation, planning, or coordination of, or carrying out, an activity to assist, promote, or deter union organizing shall be treated as paid or incurred for that activity.

(b) For purposes of accounting for expenditures, if state funds and other funds are commingled, any expenditures to assist, promote, or deter union organizing shall be allocated between state funds and other funds on a pro rata basis.

15. California Government Code § 16647 (West Supp. 2008) provides:

Exemptions

This chapter does not apply to an activity performed, or to an expense incurred, in connection with any of the following:

(a) Addressing a grievance or negotiating or administering a collective bargaining agreement.

(b) Allowing a labor organization or its representatives access to the employer's facilities or property.

(c) Performing an activity required by federal or state law or by a collective bargaining agreement.

(d) Negotiating, entering into, or carrying out a voluntary recognition agreement with a labor organization.

16. California Government Code § 16648 (West Supp. 2008) provides:

Retroactive application

This chapter does not apply to an expenditure made prior to January 1, 2001, or to a grant or contract awarded prior to January 1, 2001, unless the grant or contract is modified, extended, or renewed after January 1, 2001. Nothing in this chapter requires employers to maintain records in any particular form.

17. California Government Code § 16649 (West Supp. 2008) provides:

Severability

The provisions of this chapter are severable. If any section or portion of this chapter, or any application thereof, is held invalid, in whole or in part, that invalidity shall not effect any other section, portion, or application that can be given effect.

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IN THE

Supreme Court of the United States

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA *ET AL.*,
Petitioners,

v.

EDMUND G. BROWN, JR. *ET AL.*,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF OF AARP, ASSOCIATION FOR GERONTOLOGY AND HUMAN DEVELOPMENT IN HISTORICALLY BLACK COLLEGES AND UNIVERSITIES, CALIFORNIA ALLIANCE FOR RETIRED AMERICANS, CENTER FOR MEDICARE ADVOCACY, INC., THE GRAY PANTHERS PROJECT FUND, NATIONAL CITIZENS' COALITION FOR NURSING HOME REFORM, OLDER WOMEN'S LEAGUE, AND PARAPROFESSIONAL HEALTHCARE INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

PAMELA S. KARLAN
JEFFREY L. FISHER
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

AMY HOWE
(Counsel of Record)
KEVIN K. RUSSELL
HOWE & RUSSELL, P.C.
7272 Wisconsin Ave.
Bethesda, MD
(301) 941-1913

Counsel for Amici Curiae

February 19, 2008

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INTEREST OF *AMICI CURIAE*[1]

Amici are organizations that share an important interest in ensuring that scarce state resources are used to meet the needs of California's most vulnerable residents, including the poor, the elderly, and the disabled. Many of these individuals rely on grant and program funds from state or combined state and federal sources to obtain essential services, particularly those related to health care.

State-funded health-care services are deeply in need of the protection that AB 1889 provides. California is a large state in which nearly seven million people lack health insurance. *See* Carmen DeNavas-Walt et al., *U.S. Census Bureau, Income, Poverty, and Health Insurance Coverage in the United States: 2006*, at 24 (2007), *available at* http://www.census.gov/prod/2007pubs/p60-233.pdf.[2] State programs, including Medi-Cal (California's Medicaid program) and Healthy Families (California's version of the State Children's Health Insurance Program) provide an important safety net to millions of low-income Californians who do not have health insurance. The diversion of funds from these programs to activities unrelated to essential services – such as

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission. Letters reflecting the consent of the parties have been filed with the Clerk.

[2] All Internet sources last visited Feb. 16, 2008.

employer efforts to promote or deter union organizing – places the intended beneficiaries at serious risk of losing much-needed services.[3]

SUMMARY OF ARGUMENT

Like many governments, California has opted to provide health care and other essential services to otherwise-underserved groups primarily through private entities. The state necessarily has a very close relationship with these private providers, who are the means by which the state is implementing important government programs. In light of this close relationship, the state's interest in how these private providers spend state funds (and, in particular, ensuring that these funds reach their intended beneficiaries) is manifest. This interest is vindicated not only by AB 1889, but also by other state laws and regulations such as those governing the current Medi-Cal reimbursement system. One set of provider costs that California, like Congress before it, has opted not to subsidize is the increasingly high cost of efforts to persuade employees one way or the other concerning union representation (hereinafter "persuader activities"). That choice is especially significant in California, where the state's budget crisis threatens to reduce state funds for programs such as Medi-Cal. It is thus essential that scarce state funds reach their intended beneficiaries, rather than being diverted to finance persuader activities.

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[3] For detailed information on *amici* and their respective interests, see Appendix A.

The NLRA as a whole does not preempt AB 1889. Indeed, a state's choice not to subsidize particular conduct arises out of precisely the kind of deeply rooted local interest that is not subject to preemption, particularly in the absence of a clear preemptive statement from Congress. Nor does Section 8(c) of the NLRA in particular display any congressional intent to prohibit state legislation such as AB 1889. To the contrary, to the extent that Section 8(c) is at all relevant to this case, the protections that it provides to employers merely mirror those available under the First Amendment. And under this Court's well-established jurisprudence, a government's decision not to subsidize the exercise of a particular right does not constitute a violation of that right.

ARGUMENT

I. AB 1889 Vindicates The State's Interest In Ensuring That Scarce State Funds Are Not Misused For Expensive Fights Over Unionization.[4]

1. Governments, including California's, often find that the best way to deliver essential services such as health care to their neediest residents is through private, rather than public, entities. In many cases, the relationship between the state and the private providers is an extraordinarily close one: in the case of Medi-Cal, for example, the state's regulation of providers is pervasive, *see,*

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[4] California's Assembly Bill 1889 is codified at Cal. Govt. Code §§ 16645-49.

e.g., *infra* at 30-31 (describing Medi-Cal reporting requirements), and many providers in turn rely on Medi-Cal payments for the overwhelming majority of their funding.[5] Both the level of service the providers must offer and the reimbursements they receive are determined not by negotiations in the marketplace, but by detailed specifications unilaterally set by the state government, and the providers are subject to continuous state oversight through cost-reporting and audit requirements. The state's payments to these providers are therefore not ordinary, arms-length business transactions.[6]

Given its close links to the providers, the State's interest in how grant and program funds are spent is manifest. Without legislation such as AB 1889 in force, the State has legitimate reasons for concern that state funds allocated to these providers may be used to subsidize costly fights over unionization, thereby shortchanging the

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[5] *See, e.g.*, State of California, Office of Statewide Health Planning and Development, Long-Term Care Facility Annual Financial Data (Oct. 2005), *available at* http://www.oshpd.state.ca.us/HID/Products/LTC/AnnFinanclData/SelectedData/data/lafd122004/Lafd1204.zip (data showing that more than 28% of all nursing homes in California depend on Medi-Cal and Medicare for at least 90% of all revenues); J.A. 130-31, 153, 166, 301 (declarations of several petitioners reporting facilities that rely on Medi-Cal payments for 100% of all revenues).

[6] Accordingly, these are not the types of transactions in which the state abandons any interest in or control over its funds following their transfer. *Contra* Br. *Amicus Curiae* of the United States 32-33.

health-care services the state intended to subsidize. All that AB 1889 requires is that providers use non-state funds (including profits if they wish) to support these persuader activities.

2. California's interest in how private service providers spend state funds (and, relatedly, in ensuring that state funds actually reach their intended beneficiaries) is vindicated not only by AB 1889, but also by other state laws and regulations, most notably the recent changes to the state's reimbursement system for nursing homes and other long-term care providers. Until 2005, California paid nursing homes that participated in Medi-Cal a per diem rate, which the state's Department of Health Services calculated using the median costs incurred by comparable facilities. *See Governor Signs Nursing Home Funding Reform*, Sacramento Bus. J., Sept. 30, 2004, *available at* http://sacramento.bizjournals.com/sacramento/stories/2004/09/27/daily29.html. Because it allowed nursing homes to keep any difference between their actual spending and the per diem rate, this model gave nursing homes an incentive to spend as little as possible on patient care. *See* Philip Jacobs & John Rapoport, The Economics of Health and Medical Care 160 (5th ed. 2004) (Under a fixed-rate payment model, "[l]ong-term care facilities . . . might compromise on quality (which would also lower costs and increase profits). As long as long-term care facilities seek profits . . . they will tend to lower costs when such a payment mechanism is in place.").

In 2005, California implemented a new reimbursement system for long-term care facilities that was intended to "improve the quality of life for some of [California's] most vulnerable residents." Governor's Message—Assembly Bill No. 1629 (Sept. 29, 2004). Under the new system, Medi-Cal payments to nursing homes are based on a facility's actual costs in five major categories, each subject to a separate ceiling. *See* Medi-Cal Long-Term Care Reimbursement Act, Cal. Welf. & Inst. Code § 14126 (West 2008). This shift from a fixed per diem rate to reimbursements that match the actual costs of care was intended to encourage facilities to improve patient care by spending more on caregivers and their training. For example, the new system will reimburse facilities for all direct labor costs (such as salaries for direct patient care) up to the ninetieth percentile of the costs reported by comparable facilities.[7] Separately, it will also reimburse facilities for important indirect costs – such as housekeeping services and continued training for the nursing staff – also up to the ninetieth percentile.[8] By reimbursing

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[7] Long-Term Care Reimbursement Rates Update, *Medi-Cal Update: Billing and Policy—Provider Bulletin #343*, § 204(a) (Dep't of Health Care Servs., Oct. 2005), *as amended by* Correction Notice to Provider Bulletin #343, *available at* http://www.dhs.ca.gov/mcs/mcpd/rdb/LTCSDU/pdfs/Correction%20Notice%20to%20Provider%20Bulletin%20LTC%20343.pdf. The statute permits these regulations to be implemented via provider bulletin rather than formal regulatory action until July 2008. Cal. Welf. & Inst. Code § 14126.027(c) (West 2008).

[8] Long-Term Care Reimbursement Rates Update, *supra* note 7, § 204(b). By contrast, the state reimburses nursing

facilities for their actual costs, the new methodology eliminates the incentive for providers to minimize their costs, while the separate ceilings for each of the five cost categories ensure that providers with high costs in one category will not be pressured to cut costs on other essential services.[9] *See generally* Kathy Robertson, *Goal of*

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homes at a lower rate for costs arising from areas for which it wishes to discourage spending, such as administrative costs (reimbursed at "the 50th percentile of the allowable Medi-Cal administrative cost per diem"), *id.* § 206, and the non-labor portion of indirect costs such as housekeeping, *id.* § 205.

[9] Although both Medi-Cal and Medicare have separate provisions specifying that unionization expenses are not to be included on the cost reports that care providers submit for reimbursement, these provisions by themselves have proven inadequate to prevent the use of funds for persuader activities because the prohibited expenditures can easily be contained within other reported costs (particularly when they involve, for example, paying for time spent by supervisors relating to persuader activities). *See, e.g., Congress of California Seniors v. Catholic Healthcare West*, 104 Cal. Rptr. 2d 655 (Cal. Ct. App. 2001) (reporting allegations that employers have included expenses relating to persuader activities in their Medicare cost reports despite federal law providing that these expenses are non-reimbursable). Further, if (as petitioners seem to suggest) many employers were able to spend money on persuader activities before AB 1889 even when they were funded exclusively by Medi-Cal, *see* Pet. Br. 43, this would confirm that employers have found ways to circumvent the traditional exclusion of the costs of persuader activities from Medi-Cal and Medicare reimbursement reports. Past experiences thus demonstrate that AB 1889 is necessary to vindicate the state's interest in ensuring that Medi-Cal funds will be actually spent on their intended beneficiaries.

Relatedly, ensuring that state funds are indeed being spent on their intended beneficiaries is a useful proxy for

Nursing Homes' New Pay Plan: Better Care, Sacramento Bus. J., Jan. 20, 2006, *available at* http://sacramento.bizjournals.com/sacramento/stories/2006/01/23/story6.html.

Like AB 1889, these changes in the reimbursement methodology reflect the state's concern for, and ongoing interest in, how its funds are spent. Indeed, that the state regards this interest as significant is underscored by its willingness to commit the substantial amount of time and resources required to measure the costs of providing health-care services and determining which of those costs it will subsidize. *See infra* at 30-31.

3. One set of costs that California has opted not to subsidize is the cost of a provider's persuader activities. Here, AB 1889 mirrors longstanding federal law regarding the use of federal funds to finance persuader activities. Nearly three decades ago, a House Report "strongly encourage[d] federal agencies and other federal and state entities to take actions . . . which clearly and emphatically state that public funds earmarked for a particular use are not to be expended to influence workers about unionization." Subcomm. on Labor-Management

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ensuring quality, because it is otherwise difficult to monitor the quality of services that the state is receiving for its money. Thus, it would not be enough for the state simply to exclude the costs of persuader activities from the reimbursement rates, because, for example, if a nursing home is later found to have diverted funds for persuader activities, the harm to the intended beneficiaries will already have taken place.

Relations of the House Comm. on Educ. & Labor, 96th Cong., *Pressures in Today's Workplace* 41 (Comm. Print 1980) (emphases added).

Even more significantly, Congress enacted legislation specifically designed to ensure that employers do not use government funds to finance persuader activities. For example, the federal Head Start program, Workforce Investment Act, and National Community Service Act all prohibit the use of government program funds "to assist, promote, or deter union organizing." 42 U.S.C. § 9839(e) (amended to include subsection (e) in 1990) (Head Start Program); 29 U.S.C. § 2931(b)(7) (enacted 1998) (Workforce Investment Act); 42 U.S.C. § 12634(b)(1) (enacted 1990) (National and Community Service Act). Not one of these statutes contains any suggestion that Congress intended to alter the NLRA's regulatory scheme. Indeed, Head Start effectively acknowledges that the prohibition on using federal funds to promote or deter union organizing is consistent with the NLRA by noting that "agencies that run Head Start programs . . . are covered by the NLRA and have the same rights and responsibilities in interacting with unions as other employers."[10]

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[10] U.S. Dep't of Health & Human Servs., Admin. for Children & Families, Information Memorandum ACYF-IM-HS-00-11: Head Start and Labor Unions (Mar. 27, 2000), *available at* http://eclkc.ohs.acf.hhs.gov/hslc/Program%20Design%20and%20Management/Head%20Start%20Requirements/IMs/2000/resour_ime_00510a_020906.html; *see also* U.S. Dep't of Health & Human Servs., Admin. for Children & Families, Information Memorandum ACYF-IM-HS-97-14: Head Start Funds and Union Organizing (Nov.

These federal provisions are (as the titles of the relevant provisions of the Workforce Investment Act and the Head Start program suggest, *see* 29 U.S.C. § 2931(b)(7) ("No impact on union organizing"); 42 U.S.C. § 9839(e) ("Neutrality concerning union organizing")) entirely neutral on the question of unionization. Employers who receive federal funds remain free to "assist, promote, or deter union organizing"; Congress simply has opted not to fund such activities. Indeed, the 2000 Head Start Memorandum clarifies that the Administration of Children and Families of the U.S. Department of Health and Human Services – the agency that oversees spending of Head Start funds – is "neutral on the question of whether or not Head Start programs should become unionized," emphasizing that "this is entirely a local decision and grantee agencies and employees may take positions for or against the establishment of a union, as they see fit." Information Memorandum ACYF-IM-HS-00-11: Head Start and Labor Unions, *supra* note 10.

Congress has imposed similar restrictions on the use of Medicare funds. In 1982, it amended the Medicare Act to prohibit the reimbursement of costs related to union organizing. 42 U.S.C. § 1395x(v)(1)(N) ("In determining such reasonable

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19, 1997), *available at* http://eclkc.ohs.acf.hhs.gov/hslc/Program%20Design%20and%20 Management/Head%20Start%20Requirements/IMs/1997/ resour_ime_00813_021706.html (containing nearly identical language).

costs, costs incurred for activities directly related to influencing employees respecting unionization may not be included."). The legislative history that accompanies the bill explains that the amendments were intended to save money "through measures aimed at reducing extraordinary increases in hospital costs" without "harm[ing] beneficiaries by reducing Medicare benefits." Rep. Dan Rostenkowski, Chairman, House Comm. on Ways & Means, Statement Upon Consideration of the Conference Report on H.R. 4961 (Aug. 19, 1982), 1982 U.S.C.C.A.N. 1486, 1487.

California's AB 1889 – using the same language that Congress has employed – vindicates the same interest in ensuring that state funds are not diverted from their intended beneficiaries to finance unionization fights. Thus, while the bill was under consideration by the Assembly, its supporters explained that "[c]urrently recipients of state funds, including those who receive reimbursements or grants and those who engage in service contracts, are permitted to use those state funds to assist, promote or deter union organizing. The use of state funds in this manner is a misuse of taxpayer funds." Assembly Committee on Labor and Employment, *AB 1889 Assembly Bill—Bill Analysis* 5 (Apr. 12, 2000), *available at* http://info.sen.ca.gov/pub/99-00/bill/asm/ab_1851-1900/ab_1889_cfa_20000411_125333_asm_comm.html. And like its federal counterparts, AB 1889 does not prohibit employers from using their own funds in pro- or

anti-union efforts. Instead, like Congress, California has merely opted not to finance such activities.

4. Concerns about the use of state funds to finance persuader activities are not merely hypothetical. As the federal government itself has recognized, the costs of these activities are substantial. Commission on the Future of Worker-Management Relations (Dunlop Commission), Fact Finding Report 74 (May 1994).[11] Some of these costs arise from direct payments to labor attorneys and outside consultants, who may do everything from creating customized persuader literature, videos, and websites to coaching supervisors on how to persuade employees. *See* Kris Maher, *Unions' New Foe: Consultants*, Wall St. J., Aug. 15, 2005, at B-1; John Logan, *The Union Avoidance Industry in the United States*, 44 British J. Ind. Rel. 651, 653-58 (2006); Steven Greenhouse, *How Do You Drive Out a Union? South Carolina Factory Provides a Textbook Case*, N.Y. Times, Dec. 14, 2004, at A1. Although exact statistics are not available, it is estimated that nearly three-quarters of all employers confronted with union organizing campaigns hire outside consultants, incurring direct costs of about $200 million per year. John Logan, *Consultants, Lawyers, and the 'Union-Free'*

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[11] This report by the U.S. Departments of Labor and Commerce presents findings of a commission that held hearings and examined quantitative and qualitative evidence on the state of worker-management relations in the United States.

Movement in the USA Since the 1970s, 33 Indus. Rel. J. 197, 198 (2002) (citing John J. Lawler, Unionization and Deunionization (1990)) [hereinafter Logan, *Consultants*].

The true costs of persuader efforts are almost certainly higher, as they include not only these direct payments to outside consultants and attorneys, but also the costs of time spent by management and supervisors meeting with (and being trained by) outside consultants, as well as the time spent by all employees attending mandatory persuasion meetings. *See id.* Indeed, during unionization campaigns more than seventy percent of employees are likely required to attend these so-called "captive audience" speeches. Lawler, *supra, at* 144-45 & tbl.7.2; *see also* Greenhouse, *supra*, at A1 (as part of persuasion effort, "company required employees to listen to speakers saying the union did not want to help workers, but only wanted their dues money"). The total costs of persuader activities have been estimated at as much as one billion dollars per year. *See* Logan, *Consultants*, *supra*.

The high costs of persuader activities have particularly serious consequences in the context of employers who rely in whole or in part on government funding to support their operations. In such instances, the diversion of government funds to persuader activities deprives the intended beneficiaries of the essential services for which the funds were earmarked. In California, for example, the hospital chain Catholic Healthcare West received over $400 million in Medi-Cal

reimbursements in 1998; during the same period, the chain paid a consulting group over $2.6 million to persuade employees concerning unionization. John Logan, *Innovations in State and Local Labor Legislation: Neutrality Laws and Labor Peace Agreements in California*, *in* University of California Institute for Labor and Employment, *The State of California Labor 2003*, at 161 & n.12 (Nov. 1, 2003), *available at* http://repositories.cdlib.org/ile/scl2003/ch05/. Likewise, in a complaint brought under AB 1889 in 2002, the California Nurses Association alleged that the Antelope Valley Health Care District had spent over $1 million in state funds on a persuasion campaign. *Id.* at 174-75.

5. Ensuring that state funds reach their intended beneficiaries is particularly important in light of California's present budget crisis, which threatens to dramatically reduce the amount of state funds available for programs such as Medi-Cal.[12] The budget recently proposed by Governor Arnold Schwarzenegger calls for billions of dollars in spending cuts to reduce the state's projected $14.5 billion budget deficit. *See Governor's Budget Summary 2008-09*, at 9 (2008), *available at* http://www.ebudget.ca.gov/pdf/BudgetSummary/FullBudgetSummary.pdf; *see also* Tom Chorneau & John Wildermuth, *The Governor's*

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[12] Since 2000, California has struggled with large budget shortfalls. *See* California Budget Historical Documents for 2000-2008, *available at* http://www.dof.ca.gov/budget/historical/2008-09/.

Budget Cuts Nearly Every State Department, S.F. Chron., Jan. 11, 2008, at A-1.

Under the Governor's proposed budget, programs including Medi-Cal and Healthy Families are at risk of significant cuts. For example, the Governor proposes to reduce state spending for Medi-Cal by $1.126 billion, which would cost the state an additional $1.139 billion in lost federal matching funds.[13] The proposed changes to Medi-Cal include reduced payments to the majority of Medi-Cal providers, mandatory review of Medi-Cal eligibility four times per year, and termination of government payment of Medicare Part B premiums for some beneficiaries enrolled in both Medi-Cal and Medicare. Cal. Budget Project, *supra* note 13, at 3-4. Important services such as home health care and dental and eye care would also be cut. *Id.* Reductions in these services, particularly for chronically ill patients, may force many of these patients into long-term facilities and hospitals, where care is even more expensive. *See Medi-Cal Cuts Will Exacerbate Health Care Crisis in California, Health Care Providers Will Testify*, Medical News Today, Jan. 28, 2008, *available at* http://www.medicalnewstoday.com/articles/95297.php.

The Governor has also proposed to reduce state funding of the Healthy Families program by $41.9 million by, for example, reducing payments to

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[13] *See* Cal. Budget Project, Governor Releases Proposed Budget 2 (Jan. 16, 2008), *available at* http://www.cbp.org/pdfs/2008/080116_govbudget.pdf.

managed care plans that enroll Healthy Families children, placing limits on dental services, increasing some family contributions, and increasing co-payments for non-preventive services. Cal. Budget Project, *supra* note 13, at 4. These cuts – particularly when combined with changes in the federal SCHIP program[14] – will threaten the ability of low-income California families to receive benefits under the Healthy Families program.[15]

Taken together, the proposed cuts in funding for state health-care programs such as Medi-Cal and Healthy Families would have serious repercussions for millions of poor, elderly, and disabled Californians. Therefore, it is crucial that state funds, which are already scarce and which now face the threat of further cuts, be used to

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[14] The federal Centers for Medicare & Medicaid Services recently issued a directive to states that limits states' ability to make more families eligible for the SCHIP program. *See* Letter from Ctrs. for Medicare & Medicaid Servs. to State Health Officials (Aug. 17, 2007), *available at* http://www.cms.hhs.gov/smdl/downloads/SHO081707.pdf.

[15] Other state health care programs facing the prospect of losing funding under the Governor's proposed budget include Development and Regional Centers serving state residents with developmental disabilities; the Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) program, which is the child health component of Medicaid designed to improve the health of low-income children by financing necessary pediatric services; as well as family health programs, AIDS programs, and alcohol and other drug programs. Cal. Budget Project, *supra* note 13, at 4.

provide these vital services to their intended beneficiaries.

II. The NLRA Does Not Preempt AB 1889.

This Court has repeatedly held that the NLRA does not preempt state law unless Congress's intent to do so is clear. *See, e.g., Malone v. White Motor Corp.*, 435 U.S. 497, 504-05 (1978); *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (although Congress undoubtedly has the "extraordinary power" to preempt state law under the Supremacy Clause, "[i]t is a power that [the Court] must assume Congress does not exercise lightly," and thus "it is incumbent upon the federal courts to be *certain* of Congress' intent before finding that federal law overrides" state law) (internal quotation marks and citation omitted) (emphasis added).

There is no such clear indication from Congress that it intended to preempt state laws such as AB 1889. To the contrary, a State's control over how to spend its scarce funds is precisely the kind of distinctively local concern that this Court has held to militate against finding preemption. Nor is AB 1889 preempted because of an alleged conflict with Section 8(c) of the NLRA: Section 8(c) does not provide affirmative protections for employer speech outside the context of unfair labor practices. Even if it did provide such protections, however, its text, structure, and legislative history make clear that Congress intended this protection to extend only as far as the First Amendment, upon which AB 1889 does not infringe.

A. AB 1889 Reflects Interests That Are So "Deeply Rooted In Local Feeling And Responsibility" That They Cannot Be Preempted Except By "Compelling Congressional Direction."

This Court has repeatedly recognized that national labor legislation "leaves much to the states," *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 240 (1959) (quoting *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468, 480 (1955)), and that principles of federalism play an important role in determining the extent to which a national regulatory scheme displaces state power. Thus, it has explained that

> due regard for the presuppositions of our embracing federal system . . . has required us not to find withdrawal from the States of power to regulate where . . . the regulated conduct touch[es] *interests so deeply rooted in local feeling and responsibility* that, in the absence of *compelling congressional direction*, [the Court can] not infer that Congress ha[s] deprived the States of the power to act.

Garmon, 359 U.S. at 243-44 (internal citations omitted) (emphasis added). Because AB 1889 serves an important state fiscal interest that is "so deeply rooted in local feeling and responsibility" that a congressional intent to preempt cannot be inferred without an extraordinarily clear statement to that effect, and because there is no such clear statement in this case, AB 1889's regulation of the

use of state funds lies within the powers left open to states by the NLRA.

1. In a line of cases following from *Garmon*, the Court has explained that "inflexible application of the [*Garmon* preemption] doctrine is to be avoided, especially where the State has a substantial interest in regulation of the conduct at issue and the State's interest is one that does not threaten undue interference with the federal regulatory scheme." *Farmer v. United Brotherhood of Carpenters & Joiners of America, Local 25*, 430 U.S. 290, 302 (1977). In *Linn v. United Plant Guard Workers of America, Local 114*, for example, the Court held that the NLRA did not preempt state courts from hearing defamation suits arising from malicious libel in the context of a labor dispute because of the "overriding state interest in protecting its residents from malicious libels." 383 U.S. 53, 61 (1966) (internal quotation marks omitted). In so holding, this Court emphasized that labor preemption analysis requires "accommodation of the federal interest in uniform regulation of labor relations with the traditional concern and responsibility of the State . . . ." *Id.* at 57.

Similarly, this Court in *Farmer* held that a state-law action brought by a union member alleging intentional infliction of emotional distress was not preempted by the NLRA. 430 U.S. at 304-06. Indeed, it did so notwithstanding what it regarded as the "potential for interference with the federal scheme of regulation" – i.e., that the abusive behavior that formed the basis for the tort

claim related to behavior that gave rise to other claims that were preempted by the NLRA. *Id.* at 304. Ultimately, the Court concluded that the "potential for interference is insufficient to counterbalance the legitimate and substantial interest of the State in protecting its citizens." *Id.*[16]

Like *Linn* and *Farmer*, this case presents a deeply rooted local interest. This Court has long recognized that a state's interest in determining how to spend its scarce funds is a fundamental value underpinning our federal system. Thus, it has explained that

> [t]oday, as at the time of the founding, the allocation of scarce resources among competing needs and interests lies at the

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[16] Although the question whether a state interest is so deeply rooted as to warrant an exception to the general *Garmon* preemption rule has generally arisen in the context of state-court jurisdiction over common law torts, *see, e.g., Linn*, 383 U.S. 53; *Farmer*, 430 U.S. 290; and *Sears, Roebuck & Co v. San Diego County District Council of Carpenters*, 436 U.S. 180 (1978), the Court's opinions in those cases expressly contemplated that its reasoning would apply not only to state tort claims, but also to any state regulation wherein the state's interest does not threaten to interfere with the federal regulatory scheme. *See, e.g., Farmer*, 430 U.S. at 302; *id.* at 295-96 ("[B]ecause Congress has refrained from providing specific directions with respect to the scope of pre-empted state regulation [under the NLRA], the Court has been unwilling to declare pre-empted *all local regulation* that touches or concerns in any way the complex interrelationships between employees, employers, and unions . . . ." (internal quotations and citations omitted) (emphasis added)).

> heart of the political process. . . . [O]ther important needs and worthwhile ends compete for access to the public fisc. Since all cannot be satisfied in full, it is inevitable that difficult decisions involving the most sensitive and political of judgments must be made. If the principle of representative government is to be preserved to the States, the balance between competing interests must be reached after deliberation by the political process established by the citizens of the State . . . .

Alden v. Maine, 527 U.S. 706, 751 (1999). For example, courts are especially reluctant to find that federal actions impinge on state power in "the vital field of financial administration." *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 54 (1944). A state's control over how it spends its own funds is an equally important concern in the context of avoiding preemption of state legislative actions as it is in protecting states' sovereign immunity from suit, because the same federalism concerns underlie both areas of law.

2. Nor is there any "clear and manifest" expression of Congress's intent to have the NLRA preempt state laws such as AB 1889. It is well settled that the NLRA does not contain an express preemption provision. *Building & Construction Trades Council of the Metropolitan District v. Associated Builders & Contractors of Massachusetts/Rhode Island, Inc.*, 507 U.S. 218, 224 (1993). And although the NLRA has been

found to have preemptive effect with regard to some areas of state action, the only indicia of Congress's intent with regard to a statute such as AB 1889 actually weigh in favor of a finding that the state law is *not* preempted. Specifically, and as described in more detail *supra* at 8-11, Congress has enacted at least three analogous federal statutes – employing language virtually identical to that of AB 1889 – that prohibit employers from using federal funds for their persuader activities. To be sure, federal statutes such as these are not subject to preemption, but even their mere existence, particularly when combined with the lack of a clear statement, strongly suggests that Congress did not intend to foreclose states from enacting comparable restrictions on the use of their funds. Congress's enactment of these statutes also demonstrates that the state's interest in ensuring that its funds are spent on their intended beneficiaries rather than on persuader efforts cannot be an interest that "threaten[s] undue interference with the federal regulatory scheme," *Farmer*, 430 U.S. at 302, because Congress itself evidently did not consider its parallel interest to constitute such interference.

B. AB 1889 Does Not Conflict With NLRA Section 8(c).

There is no conflict between AB 1889 and Section 8(c) of the NLRA. As this Court has made clear, *Garmon* preemption applies only to state regulation of activity that is actually or arguably protected or prohibited by the NLRA. *See Sears*,

Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 436 U.S. 180, 187-90 (1978) (discussing *Garmon*). Here, the text, structure, and legislative history of the NLRA all demonstrate that Section 8(c) serves only as an evidentiary rule in cases alleging unfair labor practices. And even to the extent that Section 8(c) concerns employer speech rights, it was designed by Congress merely to implement the First Amendment, and AB 1889 is perfectly consistent with this Court's First Amendment jurisprudence.

1. Section 8(c) Applies Only To Unfair Labor Practices.

As its title ("Unfair labor practices") suggests, Section 8 of the NLRA, 29 U.S.C. § 158, outlines what constitutes unfair labor practices on the part of both employers and unions. Thus, for example, Section 8(a)(1) provides that "[i]t shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in" Section 7 of the NLRA, 29 U.S.C. § 157. Section 8(b) similarly provides that "[i]t shall be an unfair labor practice for a labor organization or its agents (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in [Section 7 of the NLRA] . . . or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances."

Section 8(c) of the NLRA, which follows immediately after the prohibition on unfair labor practices established in Sections 8(a) and 8(b), merely carves out an exception to liability under

those provisions, providing that "[t]he expressing of any views, arguments, or opinion, or the dissemination thereof . . . shall not constitute or be evidence of an unfair labor practice . . . , if such expression contains no threat of reprisal or force or promise of benefit." The statute certainly does not support the construction that petitioners and their *amici* now advance – namely, that any limits on speech by employers or unions, whether in the unfair labor practice context or not, automatically conflict with (and are thus preempted by) Section 8(c).

The legislative history also supports an interpretation of Section 8(c) that limits it to unfair labor practices. It indicates that Congress's main concern in enacting the provision was to ensure that employers would not be sanctioned by the NLRB merely for exercising their right to express their views. For example, one House Report emphasized that "[a]lthough the old Labor Board protests it does not limit free speech, it is apparent from decisions of the Board itself that what persons say in the exercise of their right of free speech has been used against them." H.R. Rep. No. 80-245, at 8 (1947). Similarly, a Senate Report explained that Section 8(c) "provides . . . that the Board shall not predicate any finding of *unfair labor practice* upon [] statement[s]" protected by the right of free speech. S. Rep. No. 80-105, at 24 (1947) (emphasis added).

Indeed, the NLRB itself has repeatedly recognized that Section 8(c) was intended only to apply to NLRB enforcement proceedings. *See, e.g.*,

Fiber Industries, Inc., 267 N.L.R.B. 840, 841 n.4 (1983) ("We note that it is well settled that Sec. 8(c) applies only to unfair labor practice proceedings."); *Dal-Tex Optical Co., Inc.*, 137 N.L.R.B. 1782, 1787 n.11 (1962) ("Congress specifically limited Section 8(c) to the adversary proceedings involved in unfair labor practice cases . . . .").[17]

2. To The Extent That Section 8(c) Protects Employers' Speech Rights, It Merely Implements The First Amendment, And AB 1889 Does Not Violate First Amendment Rights.

Even if Section 8(c) had imported some employer speech rights, there would still be no conflict between Section 8(c) and AB 1889. This Court has long held that "[Section] 8(c) . . . merely implements the First Amendment." *N.L.R.B. v.*

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[17] Although the United States has filed a brief in support of petitioners, it has neither provided an explanation for its sudden departure from the Board's long-standing interpretation of Section 8(c) nor attempted to reconcile these cases with the position it now takes. Thus, this Court must defer to the Board's consistent line of precedent rather than the government's litigating position in this case. *See Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 212 (1988) ("We have never applied [deference] to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice."); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446, n.30 (1987) ("An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference,' than a consistently held agency view." (quoting *Watt v. Alaska*, 451 U.S. 259, 273 (1981)).

Gissel Packing Co., Inc., 395 U.S. 575, 617 (1969). That interpretation is confirmed by the legislative history: the House Report that accompanied Section 8(c) explained that the provision sought to stop the NLRB from "us[ing] against people what the Constitution says they can say freely," H.R. Rep. No. 80-245, at 33, while its Senate counterpart indicated that the provision was added because "the Constitution guarantees freedom of speech," S. Rep. No. 80-105, at 23 (1947).

In any event, any restrictions that AB 1889 may impose on an employer's speech are entirely consistent with this Court's well-settled First Amendment jurisprudence, which makes clear that "a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right." *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 549 (1983). In *Regan*, a nonprofit public-interest group challenged a provision of the Internal Revenue Code that denies tax-exempt status to organizations engaged in lobbying activities, alleging that this provision impermissibly burdened its First Amendment rights. The Court held that the provision did not violate the First Amendment because it did "not deny [the group] the right to receive deductible contributions to support its non-lobbying activity, nor [did] it deny [the group] any independent benefit on account of its intention to lobby." *Id.* at 545. Instead, this Court emphasized, "Congress has merely refused to pay for the lobbying out of public moneys." *Id.*;

see also Harris v. McRae, 448 U.S. 297 (1980) (holding that although the government cannot prohibit abortions, neither must it subsidize them); *Maher v. Roe*, 432 U.S. 464, 479 (1977) (same, emphasizing that the Court's "cases uniformly have accorded the States a wider latitude in choosing among competing demands for limited public funds").

Similarly, in this case California has not denied any employer access to state grant or program funds on account of its persuader speech. Nor has it placed any limits on employers' freedom or ability to express their views to their employees with their own funds. Instead, it has simply declined to subsidize employer speech for or against union campaigns with state funds. In this respect, AB 1889 is nearly identical to the provision upheld in *Regan*, and is therefore entirely consistent with the First Amendment.[18]

Indeed, AB 1889 does not impermissibly infringe on even the speech of employers who receive all of their funds from the state and are thus effectively prohibited from either encouraging or discouraging their employees from unionizing. Neither the Constitution nor the NLRA require

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[18] *Amicus* for petitioner Cato Institute's reliance on the holding in *Perry v. Sindermann*, 408 U.S. 593 (1972), that the government cannot deny a benefit on a basis that infringes First Amendment rights "is unavailing . . . because here the Government is not denying a benefit to anyone, but is instead simply insisting that public funds be spent for the purposes for which they were authorized." *Rust v. Sullivan*, 500 U.S. 173, 196 (1991).

California to provide funds for an employer that cannot afford to lobby its employees using its own funds. "Although [an employer] does not have as much money as it wants, and thus cannot exercise its freedom of speech as much as it would like, the Constitution 'does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom.'" *Regan*, 461 U.S. at 550 (quoting *Harris*, 448 U.S. at 318); *see also id.* at 546 ("We again reject the 'notion that First Amendment rights are somehow not fully realized until they are subsidized by the State.'" (quoting *Cammarano v. United States*, 358 U.S. 498, 515 (1959) (Douglas, J., concurring))). Moreover, as this Court emphasized in *Rust v. Sullivan*, every affected entity is free to decline state money and seek nonpublic funds. 500 U.S. 173, 199 n.5 (1991) ("The recipient is in no way compelled to operate a [government-subsidized] project; to avoid the force of the regulations, it can simply decline the subsidy.").

This Court's First Amendment jurisprudence is also instructive with regard to petitioners' protests that AB 1889's segregated funds and enforcement provisions "impose[] serious burdens," *see* Pet. Br. 44-51, as this Court has specifically and repeatedly upheld enforcement mechanisms far more burdensome than those in AB 1889. For example, in *Regan*, this Court held that it was not "unduly burdensome" to require a group that wanted to engage in lobbying activities while maintaining tax-exempt status for funds used on other activities to maintain not only a separate

financial account, but an entire legally separate organization. 461 U.S. at 544 n.6. And in *Rust*, the Court rejected a challenge to a regulation that required recipients of family planning funds who wished to engage in abortion-related activities "to conduct those activities through programs that are separate and independent from the project that receives [government] funds." 500 U.S. at 196.

Significantly, the requirements imposed by the regulation at issue in *Rust* were substantially more burdensome than those imposed by AB 1889: unlike AB 1889, that regulation not only made clear that "[m]ere bookkeeping separation of Title X funds from other monies is not sufficient," but also included a laundry list of other "nonexclusive factors for the Secretary to consider in conducting a case-by-case determination of objective integrity and independence, such as the existence of separate accounting records and separate personnel, and the degree of physical separation of the project from facilities for prohibited activities." 500 U.S. at 180-81 (internal quotation marks omitted). And in *FCC v. League of Women Voters of California*, the Court indicated that a law which bars recipients of federal funds from engaging in editorializing but allows them to "establish 'affiliate' organizations which could then use the [recipient's] facilities to editorialize with

nonfederal funds . . . would plainly be valid." 468 U.S. 364, 400 (1984).[19]

The complaints from petitioners and *amici* regarding the alleged bookkeeping burdens created by AB 1889 ring particularly hollow insofar as they pertain to Medi-Cal providers, which have long been required to report detailed and comprehensive data on all of their revenues, services, and expenditures. Given these comprehensive standard reporting requirements, the additional reporting required to comply with AB 1889 is minimal.

For instance, hospitals receiving Medi-Cal funds must provide detailed records on *all* of their operations, not just those funded by Medi-Cal.[20]

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[19] The statute that was actually struck down in *League of Women Voters* was far more burdensome. 468 U.S. 364. At issue in *League of Women Voters* was a statute prohibiting any noncommercial educational broadcasting station that received a grant from the Corporation for Public Broadcasting from engaging in editorializing. This Court held that the statute – under which no degree of separation (of funds or otherwise) would be sufficient to overcome the ban – was invalid because it "directly prohibit[ed] the broadcaster from speaking out on public issues." *Id.* at 385. By contrast, AB 1889 creates no such prohibition. Employers may not use state funds to support persuader activity, but they are neither prevented from nor penalized for using their own funds to speak out however they please.

[20] *See* Office of Statewide Health Planning and Development, Healthcare Information Division, Hospital Annual Disclosure Report Forms, *available at* http://www.oshpd.ca.gov/HID/Products/Hospitals/AnnFinanData/forms/index.html [hereinafter Annual Report Form]; Office of Statewide Health Planning and Development, *Healthcare Information Division, Accounting &*

They must report all patient revenue, including those from private funds, broken down into thirty-eight different revenue subclassifications. *See* Annual Report Form, *supra* note 20, at 12. They must list all supplemental operating revenue they receive and indicate the sources of these funds. *See id.* at 14. Hospitals must track, calculate, and report detailed operating data, such as "the average hourly rate of pay to the second decimal for each natural classification of salary and wage expense," *Reporting Manual*, *supra* note 20, § 7020.6. Operating data must also be also broken down into thirty-eight separate task categories, *see* Annual Report Form at 21-22.1. All expenditures must also be reported in an extensive cost allocation matrix that requires over 4000 separate entries. *See id.* at 20. This comprehensive annual reporting form – which must be completed by each hospital receiving Medi-Cal funds – spans over two hundred pages (not including the instruction manuals, which fill hundreds of pages more).

Reporting Manual for California Hospitals (2d ed. 2003) [hereinafter *Reporting Manual*].

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals below should be affirmed.

Respectfully submitted,

PAMELA S. KARLAN
JEFFREY L. FISHER
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

AMY HOWE
(Counsel of Record)
KEVIN K. RUSSELL
HOWE & RUSSELL, P.C.
7272 Wisconsin Ave.
Bethesda, MD 20814
(301) 941-1913

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Counsel for Amici Curiae

APPENDIX

APPENDIX A

AARP is a nonpartisan, nonprofit organization with nearly forty million members dedicated to serving persons fifty years of age and older. AARP believes that all Americans should have access to affordable health care, including prescription drugs. Skyrocketing health costs, however, jeopardize the financial and physical well being of millions of Americans. For example, twenty-three percent of Americans have problems paying medical bills, and millions go bankrupt every year because of medical costs; twenty-nine percent of Americans say they skipped treatment, tests, or prescriptions because of costs; and, forty-six million Americans are uninsured. Thus, AARP advocates for the health and economic security of all Americans, and in particular for vulnerable people of all ages, including low-income persons and persons with disabilities. To that end, AARP supports efforts at the state and national level to ensure that these individuals have continuous access to quality health care through publicly administered health insurance programs, including Medicaid. AARP encourages states to exercise available options for expanding Medicaid eligibility and services, and to ensure the highest level of Medicaid participation among all health care providers.

The **Association for Gerontology and Human Development in Historically Black Colleges and Universities (AGHDHBCU)** is a national organization that serves to help develop and

strengthen gerontology programs among historically black colleges and universities to benefit their faculty, staff, students and the communities they serve. AGHDHBCU is committed to public policies that protect the delivery of essential government funded services for all Americans with the greatest social and economic needs. AGHDHBCU is concerned about government contractors' diversion of funds intended for this vulnerable population. AGHDHBCU supports AB 1889 as a needed effort by the state of California to maintain accountability and ensure proper use of scarce public funds.

California Alliance for Retired Americans (CARA) is a statewide senior advocacy organization working to improve the quality of life for seniors and their families in California. CARA represents over 800,000 seniors through our 150 affiliated organizations, and are the state chapter of the national Alliance for Retired Americans. CARA is committed to public policies that protect the delivery of essential government-funded services to the most vulnerable segments of the population. CARA is concerned about government contractors' diversion of funds intended for the provision of desperately needed services, and supports AB 1889 as a reasonable and appropriate effort by the State of California to maintain accountability and ensure the proper use of scarce public funds. CARA worked hard in support of AB 1889 in California, as did many of its affiliated organizations.

The **Center for Medicare Advocacy, Inc.** is a national, private, non-profit organization, founded in 1986, that provides education, analytical research, advocacy, and legal assistance to help elders and people with disabilities obtain necessary health care. The Center focuses on the needs of Medicare beneficiaries, people with chronic conditions, and those in need of long-term care. The Center provides training regarding Medicare and healthcare rights throughout the country and serves as legal counsel in litigation of importance to Medicare beneficiaries nationwide. The Center for Medicare Advocacy, Inc. supports public policies that promote appropriate use of public healthcare funding for healthcare services for patients. The Center for Medicare Advocacy, Inc. is concerned about government contractors' diversion of funds from healthcare services to other, non-healthcare purposes and supports AB 1889 as a reasonable and appropriate effort by the State of California to maintain accountability for public funds and ensure the proper use of public healthcare dollars.

The mission of the **Gray Panthers Project Fund (Gray Panthers)** is to bring together young and old, women and men of all backgrounds to achieve social and economic justice and peace. Gray Panthers strives to create a society that puts the needs of people over profits, responsibility over power and democracy over institutions. Gray Panthers is committed to public policies that protect the delivery of essential government-

funded services to the most vulnerable segments of the population, thus supporting the Gray Panthers's vision of putting responsibility over power. Gray Panthers is concerned about government contractors' diversion of funds intended for the provision of desperately needed services, and as such supports AB 1889 as a reasonable and appropriate effort by the State of California to maintain accountability and ensure the proper use of scarce public funds.

The **National Citizens' Coalition for Nursing Home Reform** (**NCCNHR**: The National Consumer Voice for Quality Long-Term Care) is a national organization of individuals and community groups that advocates for quality for people with long-term care needs, with a particular focus on ensuring adequate staffing and raising other standards related to the provision of care. NCCNHR is committed to public policies that protect the delivery of essential government-funded services to the most vulnerable segments of the population and supports efforts to maintain accountability and ensure the proper use of scarce public funds.

The **Older Women's League (OWL)** is the only national grassroots membership organization to focus solely on issues unique to women as they age. OWL strives to improve the status and quality of life for midlife and older women. OWL is a non-profit, non-partisan organization that accomplishes its work through research, education, and advocacy activities conducted through a nationwide chapter network. OWL is

committed to public policies that help women access affordable health care coverage. Additionally, OWL strives to protect the delivery of essential government-funded programs and services that help women achieve better health outcomes and financial security in retirement. OWL believes that state resources should be used to meet the needs of California's most vulnerable residents, many of whom are women. As such, resources should not be diverted from these programs to pay for activities unrelated to essential services.

Paraprofessional Healthcare Institute (PHI) is a national nonprofit that works to improve the lives of people who need home and residential care by improving the lives of the workers who provide that care. Our workplace and policy expertise helps consumers, workers and employers improve long-term care by creating quality direct-care jobs. PHI's goal is to ensure caring, stable relationships between consumers and workers, so that both may live with dignity, respect, and independence. PHI supports AB 1889 as a necessary mechanism for the State of California to maintain accountability and ensure that public funds are targeted toward the provision of high-quality care.

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IN THE

Supreme Court of the United States

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, ET AL.
Petitioners,

v.

EDMUND G. BROWN, JR., ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE AMERICAN HOSPITAL ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

MELINDA REID HATTON
LAWRENCE HUGHES
AMERICAN HOSPITAL ASSOCIATION
Liberty Place, Suite 700
325 Seventh Street, N.W.
Washington, DC 20004
(202) 626-2346

F. CURT KIRSCHNER, JR.
Counsel of Record
O'MELVENY & MYERS LLP
275 Battery Street
San Francisco, CA 94111
(415) 984-8701

IRVING L. GORNSTEIN
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

Attorneys for Amicus Curiae

QUESTION PRESENTED

Whether the State of California's regulation of non-coercive employer speech about union organizing, California Assembly Bill No. 1889, Cal. Gov't Code §§ 16645.2, 16645.7, is preempted by federal labor law.

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This *amicus curiae* brief is submitted in support of petitioners.[1]

INTEREST OF AMICUS

The American Hospital Association (AHA) is a national not-for-profit association that represents the interests of nearly 5,000 hospitals, health care systems, networks, and other care providers, as well as 37,000 individual members. The members of the AHA are committed to finding innovative and effective ways of improving the health of the communities they serve. The AHA educates its members on health care issues and trends, and it also advocates on their behalf in legislative, regulatory, and judicial fora to ensure that their perspectives and needs are understood and addressed. Almost all hospitals in California that are members of the AHA receive Medi-Cal funding from the state in exchange for medical care that they provided to poor and other patients who meet the state's eligibility criteria. Receipt of those payments subjects the hospitals to AB 1889's restrictions on non-coercive employer speech about union organizing. The AHA therefore has a significant interest in the resolution of the question whether AB 1889 is preempted by federal labor law.

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[1] Pursuant to Rule 37, letters of consent from the parties have been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus*, its members, or their counsel contributed monetarily to the brief.

SUMMARY OF ARGUMENT

California Assembly Bill No. 1889 ("AB 1889") is preempted by the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158(c), because it regulates non-coercive employer speech that Congress intended to insulate from state regulation.

A. This Court's cases establish that when Congress has focused on particular conduct and has refused to make that conduct unlawful under the NLRA, a state has no authority to regulate that conduct. Any state effort to regulate such conduct is preempted by Congress's decision to leave the conduct unregulated.

B. In Section 8(c) of the NLRA ("Section 8(c)"), Congress specifically focused on and refused to prohibit non-coercive employer speech about union organizing. A state therefore has no authority to regulate such non-coercive speech.

Section 8(c) reflects Congress's judgment that a fully informed decision by employees on whether to select a union is possible only when employers, as well as unions, have an opportunity to express their views. Section 8(c)'s purposes cannot be realized if unions are free to make the arguments they choose, while employers are effectively forced by the state to remain silent.

C. AB 1889 constitutes impermissible regulation of non-coercive employer speech and is therefore preempted. AB 1889 broadly prohibits any expenditure of state funds by an employer to influence an employee's decision on whether to select a union. That sweeping prohibition reflects the state's judgment that employer speech interferes with employee choice. Thus, the very speech that Congress viewed

as promoting informed employee choice, the state views as interfering with it. It is the very speech that Congress sought to encourage that the state seeks to stifle. The conflict between AB 1889 and federal labor policy could not be clearer.

AB 1889 also acts as a real deterrent to employer speech. It obligates employers that want to express their views on unionization to bear the substantial burden of establishing a segregated account containing non-state funds. It also requires such employers to maintain voluminous records that are sufficient to show that any money spent to speak on unionization was derived from a non-state source. It also invests unions with the power to file lawsuits that involve expensive discovery, and treble damages and attorneys fees for alleged violations. Those features of AB 1889 can effectively coerce an employer into silence during an organizing campaign.

D. AB 1889 is of particular concern for hospitals in California. First, hospitals, which employ a large and growing number of employees providing essential care for their communities, are frequently the subjects of union organizing drives. Second, virtually all hospitals in California receive state reimbursement for poor and other patients who meet the eligibility criteria for the state's Medi-Cal program. This combination of circumstances puts hospitals at the center of this controversy over employer free speech.

At the same time, hospitals are perhaps the least equipped to withstand the financial burden that AB 1889 imposes through its requirements for segregated accounts and heightened recordkeeping. Even though almost all hospitals in California provide

care for the poor through the Medi-Cal program, the state reimburses hospitals less than their costs for providing care to Medi-Cal patients. AB 1889's costly record-keeping and other administrative requirements significantly exacerbate that burden.

When hospitals are deterred by the state from communicating to their employees about the appropriate hospital-employee relationships within their community, it is not just the hospitals that are adversely affected. The employees who lack the information necessary to make a fully informed choice also are harmed.

E. There is no basis for the court of appeals' holding that regulation that takes the form of a restriction on the use of state funds is not preempted. Under this Court's cases, a state may no more regulate in the labor field through a funding restriction than it may regulate in any other way.

There are good reasons to adhere to that principle here. A use restriction that is implemented by requiring an employer to undergo the substantial burden of creating a segregated private account and maintaining detailed records can be just as effective as any other kind of regulatory restriction in deterring employer speech. That restriction is compounded when unions are permitted to file lawsuits seeking treble damages and attorneys' fees for alleged violations.

Moreover, AB 1889 does not take the form of a neutral requirement that funds must be spent to further the purposes of a program. Instead, AB 1889 targets only employer speech on unionization in order to further the state's judgment that such speech interferes with employee choice. Underscoring its

lack of neutrality, AB 1889 expressly permits the use of state funds to advance pro-union objectives, such as the negotiation of agreements to recognize a union without a secret ballot election. Basic preemption principles preclude a state from leveraging its funds to promote its own labor policy, particularly when that state policy so clearly conflicts with the federal labor policy reflected in the NLRA.

ARGUMENT

AB 1889 IS PREEMPTED BECAUSE IT REGULATES NON-COERCIVE EMPLOYER SPEECH THAT CONGRESS INTENDED TO LEAVE UNREGULATED

A. The National Labor Relations Act Preempts State Laws That Regulate Conduct That Congress Intended To Leave Unregulated

This case is governed by the Court's repeated holdings that the National Labor Relations Act (NLRA) preempts state laws that regulate conduct that Congress intended to leave unregulated. The Court's decisions in *Teamsters v. Morton*, 377 U.S. 252 (1964), *Lodge 76, International Ass'n of Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976), and *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 614 (1986), establish the scope of that preemption principle.

In *Morton*, the Court held that the NLRA preempted a state law that prohibited a peaceful secondary boycott that the NLRA did not prohibit. The Court explained that if a state law could "proscribe the same type of conduct which Congress focused on

but did not proscribe . . . the inevitable result would be to frustrate the congressional determination to leave this weapon of self-help available, and to upset the balance of power between labor and management expressed in our national labor policy." *Morton*, 377 U.S. at 259-60.

In *Machinists*, the Court held that the NLRA permits employees to refuse to work overtime and that a state law that penalized that tactic was therefore preempted by the NLRA. 427 U.S. at 149-50. The Court reasoned that the state lacked authority to deny "one party to an economic contest a weapon that Congress meant him to have available." *Id.* at 150 (citation and internal quotation marks omitted).

And, in *Golden State Transit*, the Court held that a city could not condition a taxi license on a company's settlement of a strike. The Court explained that Congress intended to permit employers to respond to an employees' strike by resisting it, and that the city's action interfered with that congressional policy choice. 475 U.S. at 618.

Morton, *Machinists*, and *Golden State Transit* establish a clear rule for determining the preemptive scope of the NLRA. When Congress fails to make certain conduct unlawful under the NLRA, it not only intends to insulate that conduct from the control of the National Labor Relations Board ("Board"), but also intends to insulate it from state regulation. As the Court has explained, Congress's failure to make certain conduct a violation of the NLRA warrants the inference that Congress intended for the conduct "to be left for the free play of contending economic forces." *Machinists*, 427 U.S. at 141 n.4. Moreover, "[t]he States have no more authority than

the Board to upset the balance that Congress has struck." *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 751 (1985).

B. Congress Intended That Employers Have The Opportunity To Engage In Non-Coercive Speech About Union Organizing Without Interference From A State

In the NLRA, Congress declined to prohibit non-coercive speech by employers about union organizing. Accordingly, under this Court's decisions in *Morton*, *Machinists*, and *Golden State Transit*, a state also lacks authority to regulate such non-coercive employer speech.

Section 8(c) is the source of Congress's protection for non-coercive employer speech. It provides that "[t]he expressing of any views, argument, or opinion, or the dissemination thereof . . . shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit." 29 U.S.C. § 158(c). That provision reflects Congress' judgment that national labor policy requires that employers, as well as unions, have an opportunity to engage in non-coercive speech on the subject of unionization.

Indeed, prior to the enactment of Section 8(c), the Board had interpreted the NLRA to require employers to remain neutral during a union organizing campaign. *See Letz Mfg. Co.*, 32 N.L.R.B. 563, 571-572 (1941). After this Court held that the NLRA only bars employer speech that is coercive, *see NLRB v. Virginia Elec. & Power Co.*, 314 U.S. 469, 477 (1941), Congress enacted Section 8(c) to "insure both to employers and labor organizations full freedom to

express their views to employees on labor matters." S. Rep. No. 80-105, at 23-24 (1947). In revising the NLRA, "Congress necessarily decided not only what coercive tactics should be forbidden, but what methods of persuasion should be permitted employers seeking to induce their employees not to join a union." Archibald Cox, *Labor Law Preemption Revisited*, 85 Harv. L. Rev. 1337, 1352 (1972).

Section 8(c) "manifests a congressional intent to encourage free debate on issues dividing labor and management." *Linn v. United Plant Guard Workers*, 383 U.S. 53, 62 (1966). Consistent with that purpose, "an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a threat of reprisal or force or promise of benefit." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969).

Congress protected non-coercive employer speech because it viewed such speech as critical to achieving the NLRA's goals. That protection not only reflects Congress's interest in giving both employers and unions an opportunity to make their case during an organizing drive. It also reflects Congress's judgment that the exchange of views promotes an informed decision by employees on whether to select a union. The NLRA seeks to establish the conditions for employees to make a "free and reasoned choice" on whether to unionize, and "such a choice" is "undoubtedly" imperiled when employees lack information "with respect to one of the choices available." *Excelsior Underwear, Inc.*, 156 N.L.R.B. 1236, 1240 (1966). When employees are allowed to hear only one side of the story, a fully informed decision is not possible.

In fact, the NLRA incorporates the principle that debate "should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasant sharp attacks." *Linn*, 383 U.S. at 62 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). The NLRA accordingly does not authorize the Board to "police or censor propaganda" unleashed in an organizing campaign, but instead leaves "to opposing parties the task of correcting inaccurate and untruthful statements." *Linn*, 383 U.S. at 60 (quoting *Stewart-Warner Corp.*, 102 N.L.R.B. 1153, 1158 (1953)).

That method of facilitating an informed choice by employees on whether to select a union cannot work as Congress intended when only one side to the debate is free to speak. By enacting Section 8(c), Congress ensured that employers would have the opportunity to participate fully in these discussions on unionization, free of interference from others, including the state.

C. AB 1889 Impermissibly Regulates Non-Coercive Employer Speech On Union Organizing

1. AB 1889 establishes a state policy on employer speech on union organizing that is directly opposed to Congress's judgment that such speech facilitates a reasoned decision by employees on whether to organize and is therefore to be encouraged. Based on the state's view that employer speech that is supported by state funds "interferes with an employee's choice about whether to join or to be represented by a union," the statute prohibits employers that receive identified state funds from using them "for the purpose of influencing employees to support or oppose

unionization." 2000 Cal. Stat. ch. 872, § 1.

AB 1889 casts its regulatory net over a wide range of employers. Covered employers include any private employer that receives "a grant of state funds," as well as any private employer that receives more than $10,000 per year "on account of its participation in a state program." Cal. Gov't Code §§ 16645.2(a), 16645.7(a). The latter group includes hospitals that participate in the state's Medi-Cal program, under which the state reimburses health care providers after they have furnished needed health care services to poor and other patients who meet the state's eligibility requirements.

The statute also erects a sweeping prohibition on employer speech. It prohibits any covered employer from using state funds to "assist, promote, or deter union organizing," and it broadly defines those terms to encompass "*any attempt* by an employer to influence the decision of its employees" regarding "[w]hether to support or oppose a labor organization" or "[w]hether to become a member of any labor organization." Cal. Gov't Code § 16645(a) (emphasis added). The statute also specifies that it applies to "*any* expense, including legal and consulting fees and salaries of supervisors and employees, incurred for . . . an activity to assist, promote, or deter union organizing." Cal. Gov't Code § 16646(a) (emphasis added).

Thus, the very speech that Congress viewed as promoting employee choice, the state views as interfering with that choice. And the very speech that Congress sought to encourage, the state seeks to curtail. It is difficult to imagine a clearer conflict between state and federal labor policy.

2. Furthermore, AB 1899 tilts the playing field decidedly in the direction of unionization. The statute targets only employer efforts to influence employees, not the efforts of unions, thereby favoring one set of speakers over the other.

Beyond that, while the statute creates a categorical bar on the use of state funds to dissuade employees from joining a union, it allows employers to use state funds to engage in a number of what generally would be considered pro-union activities. For example, AB 1889 authorizes employers to use state funds to give unions access to the workplace, Cal. Gov't Code § 16647(b), and it allows employers to use state funds to voluntarily recognize a union without the conduct of a secret ballot election, *id.* § 16647(d). The state's policy to skew the debate in favor of unionization is flatly inconsistent with congressional policy "to encourage free debate on issues dividing labor and management." *Linn*, 383 U.S. at 62.

3. AB 1889 does not just establish a different policy on employer speech on the subject of unionization than Congress established. It acts as a strong deterrent to employer speech.

For those employers that are wholly dependent on state funds, AB 1889 operates as a flat ban on non-coercive employer speech. *See* Pet. Br. 43 (noting that 500 employers receive all of their funding from Medi-Cal). Such employers must simply remain silent during organizing drives.

Employers that receive funds from non-state sources may not face an equivalent flat ban on speech about unionization, but they do face formidable barriers if they decide to enter that debate.

a. First, the statute requires an employer wish-

ing to express a view on unionization to bear the substantial burden of creating a segregated fund that consists entirely of funds that are derived from non-state sources. A segregated fund is necessary because AB 1889 presumes that money spent from a commingled fund for the purpose of informing employees about unionization includes state money, thereby making the expenditure unlawful. Cal. Gov't Code § 16646(b) (allocating expenses from a commingled fund on a pro rata basis).

An example illustrates why a segregated fund is necessary. Suppose an employer spends $10,000 to express its views on unionization from a commingled account that consists of $50,000 in state funds and $50,000 in private funds. Although the employer had sufficient private funds to cover the $10,000 expense, AB 1889 would presume that half of the expenditure came from state funds and that the employer therefore violated the statute. Cal. Gov't Code § 16646(b). The only way for an employer to avoid that automatic attribution rule is to put money from private sources in a segregated account, and draw the money to inform employees about unionization from that private account.

b. AB 1889 imposes another serious burden on employers that wish to inform their employees on the subject of unionization: It requires such employers to maintain voluminous records to demonstrate that any money spent was derived from a non-state source. Cal. Gov't Code § 16645.2(c). The breadth of the statute and the realities of the workplace make that a daunting task.

For example, if an employer wants a human resource manager to devote a portion of each day dur-

ing an organizing drive to union-related activities, it must be prepared to document that it paid the manager for each of those discrete time periods from a segregated private account. Similarly, if an employee asks a supervisor a question on the benefits of a union, and the supervisor answers it, the employer apparently would have to maintain records that document that it paid for the time devoted to that one conversation from a private segregated fund.

Even the distribution of flyers to employees on the subject of unionization can involve burdensome recordkeeping. If an employer directs one of its employees to compose and mail out flyers, the employer would have to maintain records documenting that it used money from a private account to pay for the employee's time, and possibly even the paper on which the flyers appeared, the envelopes into which the flyers were placed, and the stamps that were fixed to the envelopes. Indeed, if computers, phones, fax machines, and photo copiers were used to produce and distribute the flyers, the employer presumably might be required to document that it used money from a private account to pay for the share of the equipment and utility costs attributable to that activity.

c. In addition to costly and burdensome recordkeeping and other administrative requirements, the state law authorizes the California Attorney General or any taxpayer, including a union, to sue to enforce the statute. Cal. Gov't Code § 16645.8(a). For violating the law, a court may award treble damages to the state—the amount of money spent that could not be documented as coming from a segregated private fund, plus a civil penalty of twice that amount. *Id.* §§ 16645.2(d), 16645.7(d). A prevailing private

party, including a union, also may collect attorney's fees. *Id.* § 16645.8(d). These penalties will act as a serious deterrent to hospitals because they threaten to sap needed funds from patient care and quality improvement.

d. In combination, the statute's requirement of a segregated fund, its voluminous recordkeeping requirements, and its threat of a significant financial penalty for violation of the legal requirements can effectively coerce an employer into silence. Because that conflicts with Congress's judgment that employers should be able to express their views on unionization without interference from a state, AB 1889 is preempted. As the original panel in this case reasoned, AB 1889 is preempted because it "directly regulates the union organizing process itself and imposes substantial compliance costs and litigation risk on employers who participate in that process." Pet. App. 127a.

D. AB 1889 Has Particularly Pronounced Adverse Effects On Hospitals

California hospitals are disproportionately affected by AB 1889's requirements. In particular, as discussed below, with the growth in the health care field, unions have frequently sought to organize hospital workers. At the same time, hospitals, including those in California, are committed to caring for everyone in the communities they serve, including those who are unable to pay for their care because they are poor. Toward that end, nearly all hospitals in California receive Medi-Cal reimbursement for caring for poor and other patients eligible for that program. Accordingly, at the very time when hospitals may be called upon to express a view on unionization, their

receipt of Medi-Cal and other state funds subjects them to AB 1889's severe restrictions on such speech. Those burdens are exacerbated because Medi-Cal does not fully reimburse hospitals for caring for poor and other eligible patients.

1. The health care field is the largest supplier of jobs in the United States. As of 2006, it provided approximately 13.6 million jobs for wage and salary workers, 40% of which were in hospitals. *See* Bureau of Labor Statistics, U.S. Department of Labor, *Career Guide to Industries: Health Care, 2008-2009 Edition*, http://www.bls.gov/oco/cg/cgs035.htm (last visited Jan. 15, 2008).

As the number of wage and salary jobs in the health care field has increased, unions have more frequently sought to organize health care workers. In 1995, only 8.6% of the total number of the representation elections occurred in the health care field. 60 NLRB Ann. Rep. 152, 168 (1995). By 2004, 16.2% of the representation elections occurred in health care. 69 NLRB Ann. Rep. at 234, 253 (2004). During that period, the number of representation elections in health care increased by more than 50%, whereas the total number of elections declined by 20%. 60 NLRB Ann. Rep. 168; 69 NLRB Ann. Rep. 253.

2. Given that providing care for their communities regardless of a patient's ability to pay is at the core of a hospital's mission, virtually all hospitals in California provide services for the poor and uninsured and, as a result, receive state funding through the Medi-Cal program to help compensate them for those services. 98% of the state's 314 acute care hospitals receive Medi-Cal reimbursement for caring

for poor and other patients who qualify for hospital care and services through the program. California Office of Statewide Planning & Development, *Hospital Annual Financial Data*, http://www.oshpd.ca.gov/HID/Products/Hospitals/AnnFinanData/ (last visited Jan. 15, 2008) (follow "Query Tables" hyperlink; then follow "2006" hyperlink to the data set).

For many California hospitals, Medi-Cal is a major source of operating funds: nearly one-third of acute care hospitals receive 20% or more of their gross patient revenue from Medi-Cal funds, and 8% of acute care hospitals receive 40% or more of their gross patient revenue from that source. *Id.*[2]

For a majority of hospitals in California, caring for Medi-Cal eligible patients is not only consistent

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[2] Hospitals also participate in several other state funding programs that would trigger AB 1889's stringent restrictions on employer speech, including Disproportionate Share Hospital payments, Cal. Welf. & Inst. Code § 14105.98 (supplemental funds for hospitals that have a disproportionate share of Medi-Cal patients); California Children's Service program, Cal. Health & Safety Code §§ 123805, 123830 (services to children with physical limitations and chronic health conditions); Healthy Families Program, Cal. Ins. Code § 12693 *et seq.* (for children who are uninsured and ineligible for Medi-Cal); Private Hospital Supplemental Fund, Cal. Welf. & Inst. Code § 14166.12 (emergency services, medical education, teaching hospitals, and small and rural hospitals); Construction and Renovation Reimbursement Program, Cal. Welf. & Inst. Code § 14085.5(b)(1)(A) (reimbursement for debt service on revenue bonds for new or renovated facilities or fixed equipment); Distressed Hospital Fund, Cal. Welf. & Inst. Code § 14166.23 (financial support for hospitals treating a substantial volume of Medic-Cal patients and facing significant hardships); and Genetically Handicapped Person Program, Cal. Health & Safety Code § 125125 *et seq.* (reimbursement for the care of adults with specific genetic diseases).

with their mission and an important source of their revenue, it is legally mandated as a result of their tax exempt status. 265 of the 382 California hospitals that report data to the state's Office of Statewide Health Planning and Development are not-for-profit hospitals. California Office of Statewide Planning & Development, *Hospital Annual Financial Data*, *supra* (follow "Pivot Profiles" hyperlink to data set). Under Section 501(c)(3) of the Internal Revenue Code, tax-exempt hospitals must provide care to all persons in the community able to pay through third-party payers, such as Medi-Cal. Rev. Rul. 69-545.

3. While Medi-Cal is a critical source of operating revenue for California hospitals, it does not fully reimburse hospitals for the cost of caring for Medi-Cal patients. Currently, Medi-Cal pays, on average, only 83 cents for every dollar of care provided. California Office of Statewide Planning & Development, *Hospital Annual Financial Data*, *supra* (follow "Pivot Profiles" hyperlink to data set). Thus, the substantial burdens and costs that AB 1899 imposes on hospitals through its fund segregation and record-keeping requirements, in addition to the law's threat of significant financial penalties for violating its requirements, may make it difficult for a hospital to find the funds necessary to comply with the law's requirements, if that hospital chooses to exercise its right under federal law to participate in discussions about unionization.

4. Because the overwhelming majority of California hospitals depend on Medi-Cal as a source of funding, they would have no choice but to comply with AB 1889's costly requirements if they wish to participate in the discussion about unionization.

The costs of such compliance and potential consequences of any infraction of AB 1889's requirements are such that many hospitals will be effectively deterred from taking part in these discussions.

The consequences of such silence are troubling. Hospital employees, ranging from nurses to janitorial staff, will be deprived by the state of the benefit of a full and robust discussion about the benefits and detriments of unionization. Instead, they will hear only one side. Hospitals, like other employers that are largely dependent on state funding, will be deprived of an essential right of communication that Congress sought to preserve through the NLRA. The state does not, nor should it, have the power to dictate such an unfair outcome.

E. The Court Of Appeals Erred In Holding That A State May Regulate Non-Coercive Employer Speech On Union Organizing As Long As It Does So Through A Restriction On The Use Of State Funds

1. The court of appeals understood that AB 1889 constitutes a state regulatory measure in the field of labor relations and that such regulatory measures are ordinarily preempted. It nonetheless held that the state could undertake such regulation because AB 1889 takes the form of a restriction on the use of state funds.

Under this Court's NLRA preemption decisions, however, what matters is "the nature of the activities which the states have sought to regulate," not "the method of regulation adopted." *Golden State*, 475 U.S. at 614 n.5. Just as a state many not directly regulate non-coercive employer speech about unionization through a direct prohibition because

Congress intended for such speech to be unregulated, a state may not indirectly regulate such conduct through a state funding restriction. Here, as in other contexts, a state may not seek to accomplish indirectly what it is forbidden from achieving directly.

The Court's decision in *Wisconsin Dep't of Industry, Labor & Human Resources v. Gould*, 475 U.S. 282 (1986), is controlling on this point. There, the Court invalidated a state's refusal to contract with any firm that had repeatedly violated the NLRA. The Court explained that because the state's funding restriction was designed "to deter labor law violations," it was "tantamount to regulation" and therefore preempted. *Id.* at 287-289. That the state sought to enforce its preferred policy through its spending power, rather than its police power, was a "distinction without a difference." *Id.* at 287.

The Court subsequently held that the NLRA does not have a preemptive effect when a state acts as a proprietor rather than a regulator. *Bld'g & Construc. Trades Council* v. *Associated Builders & Contractors*, 507 U.S. 218, 227 (1993). In particular, the Court held that the NLRA did not prevent a state agency supervising a construction project from requiring that contractors abide by a labor agreement in order to ensure completion of the project as quickly as possible at the lowest cost. *Id.* at 230-231.

In this case, however, the state acted in its regulatory, not its proprietary, capacity. As the court of appeals explained, the state did not enact AB 1889 to achieve the efficient delivery of goods or services; it enacted AB 1889 to implement its preferred labor policy. Pet. App. 11a-12a. The market participant

exception to NLRA preemption is therefore inapplicable, and *Gould*'s holding that a state may not seek to achieve regulatory objectives through a funding restriction is controlling.

2. The court of appeals sought to distinguish *Gould* on the ground that AB 1889 does not make employer silence a condition for "receiving" state funds, but instead restricts only the "use" of state funds. Pet. App. 17a. According to the court, the distinction between the two is that when a state imposes a use restriction rather than a receipt restriction, "an employer has and retains the freedom to spend its own funds however it wishes." *Id.* The court also concluded that a use restriction permissibly furthers the state's interest in ensuring that its funds are spent for the purposes for which they were given, and that such a use restriction therefore should be recognized as a new exception to the NLRA's normal preemption principles. *Id.* at 31a-32a.

The court's line between "use" restrictions and "receipt" restrictions does not withstand analysis, and the court's proposed new exception to NLRA preemption should be rejected for several reasons. First, use restrictions can be just as effective in compelling employer silence. As previously discussed, for employers that are wholly dependent on state funds, AB 1889 operates as a flat ban on noncoercive employer speech on union organizing. *See* Pet. Br. 43. Even for employers that have other sources of funding, AB 1889's requirement of a separate account, its burdensome recordkeeping requirements, and its threatened significant financial penalty operate as a strong deterrent to engaging in such speech.

Second, AB 1889 adopts an expansive definition of state funds that includes funds that are not ordinarily viewed as state funds after their receipt. In particular, AB 1889 bars hospitals from spending money they have received from the state for services the hospitals have already provided to particular Medi-Cal eligible patients. Money received as part of such an exchange for services rendered ordinarily is viewed as the money of the recipient, not that of the entity making the payments. For example, when a state pays an employee a salary for services already rendered, the money is commonly understood to belong to the employee, not the state. The same is true when the state pays hospitals for services they provide. In imposing limitations on the use of those funds, the state seeks to restrict how hospitals spend what would ordinarily be regarded as their money, not the state's.

Third, AB 1889 also has a direct impact on how employers use funds from private sources. In particular, AB 1889 requires an employer wishing to speak on unionization to put such *private* funds in a separate segregated account, and to maintain voluminous records on how such *private* funds are spent. And, by making employers liable for treble damages and attorney's fees for any failure to provide sufficient documentation of these expenses, AB 1889 can effectively chill employers from using even such *private* funds to speak about unionization.

Finally, AB 1889 does not take the form of a neutral requirement of general applicability that funds received from the state be spent only for program-related purposes. Rather, AB 1889 targets only an employer's expenditures on the subject of unionization, leaving unregulated all expenditures by unions

as well as other employer expenditures on labor costs. The selective and discriminatory nature of AB 1889 shows that the statute is not designed neutrally to further the state's interest in ensuring that state funds are used for program-related purposes. Instead, as previously discussed, AB 1889's express targeting of employer speech shows that it is designed to further the state's policy judgment that non-coercive employer speech interferes with the free choice of employees and therefore should be inhibited—a judgment that directly conflicts with Congress's judgment that non-coercive employer speech supports informed decisions by employees on whether to form a union and therefore should be encouraged. Whether framed as a use restriction or a receipt restriction, basic preemption principles preclude a state from leveraging its funds to promote a labor policy that so clearly conflicts with the national labor policy reflected in the NLRA.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

MELINDA REID HATTON
LAWRENCE HUGHES
AMERICAN HOSPITAL ASSOCIATION
Liberty Place, Suite 700
325 Seventh Street, N.W.
Washington, DC 20004
(202) 626-2346

F. CURT KIRSCHNER, JR.
Counsel of Record
O'MELVENY & MYERS LLP
275 Battery Street
San Francisco, CA 94111
(415) 984-8701

IRVING L. GORNSTEIN
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

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IN THE

SUPREME COURT OF THE UNITED STATES

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, *ET AL.*, *Petitioners,*

v.

EDMUND G. BROWN, JR., *ET AL.*, *Respondents.*

On Writ of Certiorari to the United States Court of Appeals For The Ninth Circuit

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JOINT BRIEF OF *AMICI CURIAE*, ASSOCIATED BUILDERS AND CONTRACTORS, INC., NATIONAL FEDERATION OF INDEPENDENT BUSINESS LEGAL FOUNDATION, AMERICAN HEALTH CARE ASSOCIATION AND NATIONAL CENTER FOR ASSISTED LIVING, SOCIETY FOR HUMAN RESOURCE MANAGEMENT, COUNCIL ON LABOR LAW EQUALITY, HR POLICY ASSOCIATION, ASSOCIATED BUILDERS AND CONTRACTORS OF CALIFORNIA, INC., AND MEMBERS OF CALIFORNIA SMALL BUSINESS ALLIANCE, IN SUPPORT OF THE PETITIONERS

Robert Fried
Thomas Lenz
Atkinson, Andelson,
Loya, Rudd & Romo
5776 Stoneridge Mall Rd.
Pleasanton, CA 94588
925-227-9200

Maurice Baskin
(*Counsel of Record*)
Venable LLP
575 7th St., N.W.
Washington, D.C. 20004
202-344-4823

Counsel for *Amici Curiae*

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INTERESTS OF THE *AMICI* [1]

The *Amici* are jointly filing this brief in support of the Petitioners in order to be certain that the Court is made aware of the serious threat to the balance of interests under federal labor law presented by the decision of the Ninth Circuit. The *Amici* represent businesses of all sizes, human resource managers, and providers of services from across a broad spectrum of industries. Many of the *Amici's* members receive funds from state and local governments, both in California and throughout the country, in the course of providing valuable services to state and local residents. At the same time, the private business recipients of such funds remain employers covered by the National Labor Relations Act, who interact with their employees under legal principles and protections specified in that preemptive federal law.

Associated Builders and Contractors, Inc. ("ABC National") is a national trade association of more than 24,000 construction contractors and related firms. ABC's members share the view that work should be awarded and performed on the basis

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[1] Pursuant to Supreme Court Rule 37.2, the *Amici* state that all parties have consented to the filing of this brief, and letters evidencing such consent are being filed with the Court. Pursuant to Supreme Court Rule 37.6, the *Amici* further state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *Amici*, their members, or their counsel made a monetary contribution to its preparation or submission.

of merit, regardless of labor affiliation. ABC members include both non-union and unionized firms, many of whom perform work on government-funded projects. ABC filed a brief as *amicus curiae* in the Ninth Circuit on behalf of the Petitioners in this case, expressing the view that California's AB 1889 infringes on the right of employers to communicate with their employees in a manner protected by the National Labor Relations Act.

The National Federation of Independent Business Legal Foundation ("NFIB Legal Foundation"), a nonprofit, public interest law firm established to be the voice for small business in the nation's courts and the legal resource for small business, is the legal arm of the National Federation of Independent Business (NFIB). NFIB is the nation's leading small-business advocacy association, with offices in Washington, D.C. and all 50 state capitals. As a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses. The NFIB Legal Foundation frequently files *amicus* briefs in the courts informing judges how the decision they make in a given case will impact small businesses nationwide.

The American Health Care Association and the National Center for Assisted Living are the nation's leading long term care organizations. AHCA/NCAL and their membership are committed to performance excellence and Quality First, a covenant for healthy, affordable and ethical long term care. AHCA/NCAL represent more than 10,000 non-profit and proprietary facilities dedicated to

continuous improvement in the delivery of professional and compassionate care provided daily by millions of caring employees to more than 2.5 million of our nation's frail, elderly and disabled citizens who live in nursing facilities, assisted living residences, sub-acute centers and homes for persons with mental retardation and developmental disabilities.

The Society for Human Resource Management (SHRM) is the world's largest professional association devoted to human resource management. Our mission is to serve the needs of HR professionals by providing the most current and comprehensive resources, and to advance the profession by promoting HR's essential, strategic role. Founded in 1948, SHRM represents more than 225,000 individual members in over 125 countries, and has a network of more than 575 affiliated chapters in the United States, as well as offices in China and India.

The Council on Labor Law Equality (COLLE) is a national association of top labor relations executives and in-house counsel dedicated to maintaining a fair and balanced national labor policy. COLLE monitors the activities of the National Labor Relations Board (NLRB) and court decisions relating to the National Labor Relations Act (NLRA) and participates as an *amicus* in important cases affecting national labor law.

HR Policy Association brings together the chief human resource officers of more than 240 of the largest corporations in the United States.

Representing nearly every major industry sector, HR Policy members have a combined market capitalization of more than $7.5 trillion and employ more than 18 million employees world wide. The association's mission is to assist large employers in furthering critically important business and societal objectives.

Associated Builders and Contractors of California ("ABC California") is a non-profit association that represents its five individual California Chapters, the California and federally approved apprenticeship and craft training programs they sponsor, and their more than 1200 predominantly open shop (non-union) individual construction company members. Among these member companies are general contractors and subcontractors that perform work under contracts with California state agencies, local governments and private developers that receive state financial assistance. ABC California and its member chapters have played a central role in litigating against efforts by governmental entities in California to regulate private sector labor relations in the guise of ostensibly "neutral" public purposes.

The California Small Business Alliance is a non-profit, non-partisan coalition of California trade associations committed to providing small businesses with a single voice before all levels of government. Member organizations who have specifically lent their endorsement to this *amicus* brief are as follows:

California Autobody Association, a non-profit trade association comprised of approximately 1,100 individual and independent businesses within the automobile collision repair industry throughout California;

California Furniture Manufacturers Association, serving the interests of the furniture industry throughout California;

California Independent Petroleum Association, representing the diverse interests of its more than 400 members in the oil and gas industry;

Korean Dry Cleaners Laundry Association, assisting roughly 2,000 Korean-American dry cleaners in Southern California with their business problems interacting with the government;

Metal Finishing Association of Southern California, a non-profit trade association of management executives in the fields of metal finishing and related processes, representing more than 200 companies in Southern California;

Printing Industries of California, the trade association for the graphic arts community in California, representing more than 5,400 member companies in the state.

As further explained below, the *Amici* are jointly filing this brief in order to advise the Court of the significant adverse impact of the Ninth Circuit's decision on private sector labor relations throughout the United States and in California, due to the

pervasive nature of state and local government-funded programs. The *Amici's* brief will assist the Court in reviewing the issues raised by the Petition, because the *Amici*, representing many industries and interests, have broad familiarity with state-funded programs and the likely adverse impact of AB 1889 on employer communications with employees. The Amici strongly support reversal by this Court of the Ninth Circuit's decision.

SUMMARY OF ARGUMENT

The Ninth Circuit's decision upholding California's Assembly Bill No. 1889, Cal. Gov't Code §§ 16645-16649 (collectively, "AB 1889"), improperly allows state and local governments to use their spending powers to impose regulatory labor policies on large numbers of private employers and employees under the guise of maintaining state "neutrality." The scope of state and local spending potentially affected by the appeals court's ruling is staggering, totaling trillions of dollars annually in California and in the numerous other states that have enacted or are considering similar legislation.

The *Amici* submit that the Ninth Circuit significantly understated the impact of AB 1889's administrative, accounting and reporting requirements on the ability of small businesses to communicate with their employees on the subject of labor relations. Many of the private employers who receive such funds, including many of the *Amici's* members, are small businesses who are completely reliant on government grants. Such employers have

not previously been held to lose their protected federal rights under the NLRA merely by accepting state funds and providing services benefiting state residents. The Ninth Circuit, however, in direct conflict with decisions of the Second and Seventh Circuits,[2] has so held in the present case.

The Ninth Circuit also improperly interpreted the NLRA as somehow failing to protect the rights of employers to communicate with their employees on the important subject of labor relations, and the rights of employees to receive such information, under the plain language of Section 8(c) of the NLRA. The court's holding further conflicts with this Court's own longstanding interpretation of the Act, as well as with decisions of the National Labor Relations Board and other courts of appeals.

Finally, the Ninth Circuit's holding that California's use of its spending power to regulate employer speech does not violate either of this Court's settled doctrines of labor law preemption, known as "*Garmon*" and "*Machinists*" preemption respectively, is plainly wrong. AB 1889 is preempted under both doctrines. AB 1889 certainly regulates speech that the NLRA protects, prohibits, or arguably protects or prohibits within the meaning of *Garmon*. The California law also regulates non-coercive activity that Congress intended to be governed "by the free play of economic forces" within the meaning of *Machinists*. The Ninth Circuit's

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[2] *Healthcare Association of New York State, Inc v. Pataki*, 471 F.3d 87 (2nd Cir. 2006); *Metropolitan Milwaukee Ass'n of Commerce v. Milwaukee County*, 431 F.3d 277 (7th Cir. 2005).

failure to find preemption of AB 1889 therefore compels reversal by this Court.

ARGUMENT

I. CALIFORNIA'S REGULATION OF PROTECTED SPEECH IN VIOLATION OF FEDERAL LABOR LAW WILL HAVE A SIGNIFICANT ADVERSE EFFECT ON BOTH EMPLOYERS AND EMPLOYEES AND MUST BE FOUND PREEMPTED

A. Absent Reversal By This Court, The Ninth Circuit's Erroneous Decision Will Adversely Affect The Expenditure of Trillions Of Dollars Of State And Local Funds Throughout The Country.

In *Wisconsin Dept. of Indus., Labor & Human Relations v. Gould, Inc.*, 475 U.S. 282, 287 (1986), this Court held that "[state] spending power may not be used as a pretext for regulating labor relations." The Ninth Circuit violated this settled principle in the present case by conceding that California's AB 1889 "sweeps broadly" beyond the state's proprietary interests so as to regulate private sector labor policy, Pet. App. 11a-12a, and by then failing to find such a law to be preempted by the National Labor Relations Act. To the contrary, the court of appeals should have been compelled to find labor law preemption under the settled holdings of this Court. Absent reversal by this Court, the Ninth Circuit's decision will open the door to pervasive state regulation of

private sector labor relations, undermining the NLRA through a crazy quilt of spending restrictions that will be modeled on AB 1889.

At the outset, the Ninth Circuit failed to address the broad scope of state spending covered by this law. In Fiscal Year 2007-08, the state of California is expected to spend more than $130 billion on grants and contracts. *See* Schedule 10 – Summary, http://www.ebudget.ca.gov/BudgetSummary/SCD/1249579.html. Thousands of private employers in virtually every service, manufacturing and construction category are the recipients of such state funds, including many small business members of the *Amici*.

Throughout the country, state spending as a whole has dramatically increased in recent decades, and now exceeds a trillion dollars per year. *See* U.S. Census Bureau, Table 1: State and Local Government Finances Level of Govt. and By State,www.census.gov/govs/estimate/0200ussl_1.html Local government spending is nearly double that of the states themselves, adding trillions more to the total. *Id.*

State spending on Medicaid represented the single largest increase in state expenditures in the 1990s, growing nearly 150 percent. Snell, *State Spending in the 1990s, National Conference of State Legislatures* (2003), http://www.ncsl.org/programs/fiscal/stspend90s.htm. Another recent study found that total state spending on healthcare in fiscal year 2002 amounted to more than $290 billion, of which Medicaid expenditures accounted for $201 billion.

See "State Health Care Expenditure Report," Milbank Memorial Fund, the National Association of State Budget Officers, http://www.milbank.org/reports/ 2000shcer/index.html.[3]

Even these levels of spending are exceeded by state and local expenditures on education and capital outlays, including construction. Other categories of state and local spending that frequently are distributed to private employers in order to obtain needed services include social services, hospitals, transportation, corrections, and the environment. *See* U.S. Census Bureau, *supra*, Table 1.

The nationwide expenditures by state and local governments take on added significance when it is recognized that California's AB 1889 has become the model for similar state and local legislation elsewhere. In December 2002, New York became the second state to enact labor neutrality legislation. *See* N.Y. Labor Law § 211-a. As noted by the Second Circuit in *Healthcare Assn of N.Y. State, Inc. v. Pataki*, 471 F. 3d 87 (2d Cir. 2006), the New York Labor Law is very similar to the California provision and was obviously modeled after AB 1889. Similar

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[3] New York's 2006-07 state budget appropriated more than $45 billion for spending on Medicaid. *See* 2006-07 Budget Rep. 40-43, http://www.budget.state.ny.us/pubs/ enacted/enacted.html. An analysis conducted by the Florida Senate found that the Medicaid program funded approximately two-thirds of the resident days in Florida nursing homes. *See* "Senate Staff Analysis and Economic Impact Statement, SB 1378" (2002),www.leg.state.fl.us/ data/session/2002/Senate/bills/analysis/pdf/2002s1378.hc.pdf.

laws subsequently passed in other states include Me. Rev. Stat. Ann. Tit. 22 § 1861 (2004) (prohibiting health care institutions from using state funds to "interfere with, inhibit or disrupt the free exercise of the right of all employees to organize"); and Ohio Rev. Code Ann. § 5119.62 (2004) (prohibiting community mental health agencies from using state funds "for the purpose of influencing employees with respect to unionization"); Florida Public Health Code 440.443(1).

The Petitioners have cited 13 different state legislatures that have considered legislation identical or similar to AB 1889 since publication of the Ninth Circuit's decision in 2006. Pet. Brief at 56, n.11-12. It is also worth noting that the following additional states have considered legislation similar to AB 1889 while the lower court challenges to AB 1889 have been *pending*: Arizona HB 2503 (2001) and HB 2548 (2002) (restricting the use of state funds by state contractors); Colorado SB 130 (2002) (same); Georgia SB 271 (1999)(restricting the use of state funds by employers); Hawaii, "Bill to Provide for State Neutrality in Union Organizing" (2003); Illinois HB 726 (2001)(prohibiting the recipients of state funds from using those funds to promote, assist, or deter unionization), HB 3395 (2003)(restricting the use of state funds, requiring that unions be given equal access to employees, and prohibiting captive meetings during working hours); Indiana Bill 1980 (2001)(prohibiting any employer with a reimbursement agreement with the state from using state funds to support or oppose unionization); Iowa HJ 215/256, HF 126 (2001) (prohibiting use of state funds by employer that was

reimbursed by the state, received grants from the state, had contracts with state, or participated in state programs); Louisiana SB 1078 (2001)(prohibiting employers from using state funds to assist, promote or deter unionization); Missouri HB 1816 (2000) (same), HB 2209 (2002) (same), HB 308 (2003) (same); New Hampshire SB 162 (2002)(limiting use of state funds by private contractors; specifies prohibited activities, including using state funds to "defend against unfair labor practice charges"); and North Dakota SB 2434 (2001)(providing limits on use of state funds for union organizing).[4]

By contrast, prior to enactment of AB 1889, there were *no* other state laws that so broadly regulated the ability of private employers to communicate with their employees on the vital subject of unionization. It can thus fairly be stated that only the pendency of this appeal is holding back a flood of state and local laws that would restrict private employer rights of free speech as never before. Failure to halt this tide now will certainly result in the balkanization of labor law that Congress and this Court have long sought to prevent. *Wisconsin Dept. of Indus., Labor & Human Relations v. Gould, Inc.*, 475 U.S. 282, 288 (1986); *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144 (1971).

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[4] Enactment of AB 1889 has also encouraged local jurisdictions to impose new restrictions on recipients of government funds favoring unionization in the construction industry. *See Johnson v. Rancho Santiago Community College District*, Case No. SACV 04-280 JVS (S.D. Cal.) (stayed pending the outcome of this appeal).

As this Court has recognized in the past, little will be left of the NLRA's regulatory scheme if each state is free to use its spending power to impose its labor policy views on private sector employers. *Gould*, 475 U.S. at 288-89. The proliferation of state legislation around the country modeled on AB 1889, combined with the trillions of dollars of state and local spending that could be adversely affected by the Ninth Circuit's erroneous opinion, clearly demonstrates that the concerns this Court expressed in *Gould* and previous cases is in danger of becoming a reality. Certainly, the free speech rights of many thousands of private employers covered by the NLRA, who receive state and local funds not only in California but also in the other states listed above, depend on this Court's reversal of the Ninth Circuit's decision in this case.

B. Contrary To The Ninth Circuit's Decision, AB 1889 Will Have A Significant Adverse Impact On The Federally Protected Right Of Employers, Particularly Small Businesses, To Communicate With Their Employees.

The importance of this case and the need for reversal of the Ninth Circuit's decision are underscored by the magnitude of AB 1889's coercive impact on employers. The Ninth Circuit greatly understated the effects of AB 1889 on the ability of covered employers to communicate effectively with their employees in a manner protected by the NLRA. The Ninth Circuit found that AB 1889's effect on employer speech was "indirect and incidental," when

the reality is much more consistent with the dissent's view that the statute imposes "seemingly impossible compliance burdens." Pet. App. 4a-5a, n.2, 17a-18a, n.10.

The Ninth Circuit ignored substantial record evidence that many California employers receive all or virtually all of their operating revenues from the state for services provided under state programs. According to the record before the court, for example, over 500 employers in California rely exclusively upon Medi-Cal reimbursements, covered by AB 1889, for their operating revenue. J.A. 301. One such employer, Zilaco, Inc., submitted an affidavit to the district court declaring without contradiction that 100% of one of its facility's revenues was dependent on Medi-Cal, while a second facility was 90% dependent on state funds. J.A. 153. The employer was compelled to abandon all communications with its employees on the subject of unionization, after passage of AB 1889, as a matter of "survival." *Id.* Many of the *Amici's* members, in California and elsewhere, will be presented with the same draconian choice if the Ninth Circuit's decision is allowed to stand.[5]

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[5] The number of employers so affected is greatly increased in California by the state's expansive definition of "public funds," as set forth in California Labor Code Section 1720(b), which includes the following: "(1) The payment of money or the equivalent of money by the state or political subdivision directly to or on behalf of the public works contractor, subcontractor, or developer; (2) Performance of construction work by the state or political subdivision in execution of the project; (3) Transfer by the state or political subdivision of an asset of value for less than fair market price; (4) Fees, costs, rents, insurance or bond premiums, loans, interest rates, or

Many more employers, who have independent revenue streams but nevertheless accept state and local funds, will still face severe burdens if compelled to comply with the restrictions of AB 1889. Such employers will be required to segregate accounts and establish separate accounting systems to track each expenditure relating to union organizing. Absent such separation, as to which the law offers no guidance whatsoever, the challenged statute entitles the state to *presume* a violation on the part of the employer. Cal. Govt. Code 16646(b).

As construction industry representatives testified in California, AB 1889 poses "mammoth practical accounting problems." J.A. 308. "This is an accounting nightmare for all small business people, including subcontractors in as diverse fields as landscape contractors who would have as simple a job as reseeding a local football field, to large general contractors." *Id.* Similarly, a health care provider stated in an affidavit that "we determined that in order to attempt to comply with the accounting and record-keeping requirements of AB 1889, we would have to fundamentally and substantially alter our

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other obligations that would normally be required in the execution of the contract, that are paid, reduced, charged at less than fair market value, waived, or forgiven by the state or political subdivision; (5) Money loaned by the state or political subdivision that is to be repaid on a contingent basis and (6) Credits that are applied by the state or political subdivision against repayment obligations to the state or political subdivision. See also California Public Utilities Code Section 333.14(h) (including production incentives and supplemental energy credits in the definition of "public monies.")."

financial accounting and record-keeping." J.A. 135, 158, 168.

The adverse effects of AB 1889 are thus not limited to the particular state programs for which state funds are received. In order to avoid onerous administrative costs and potential litigation, many employers receiving state funds under AB 1889 believe it necessary to cease all communications with employees on both state-funded and non-state projects, due to the difficulty of proving that no state funds have been commingled with non-state operations. A skilled nursing provider testified to the district court that "the burden and cost associated with [the necessary accounting] change was so extreme that we decided that we could not afford it." J.A. 158.

The coercive effects of AB 1889 are magnified by the creation of private causes of action against offending employers, causing them to face the prospect of litigation costs and potential treble damages if they risk any employee communications. *Id.* at 16645.8.

Indeed, the record of enforcement of the California statute reflects exactly such a coercive impact on employers' exercise of their free speech rights. As detailed in the Petitioners' Brief, at 49, unions filed numerous court complaints against employers under the law in 2001-2, claiming improper uses of state funds on non-state programs. J.A. 178-232. Rather than confront the administrative and judicial costs of defending such complaints, a number of employers either stopped all

communications with their employees or avoided entering into state contracts.[6]

In the face of such record evidence, the Ninth Circuit's holding that AB 1889's impact was "indirect," "incidental," and insufficient to impinge on federally protected rights, was clearly erroneous. Moreover, the Ninth Circuit's opinion directly conflicts with the findings of the Second Circuit and Seventh Circuit when faced with similar state laws.

In *Healthcare Ass'n of N.Y. State, Inc. v. Pataki*, *supra*, 471 F. 3d at 105, the Second Circuit held that state funding restrictions may in fact "deter employers from the exercise of their rights," to the extent that the state imposes restrictions on private employers' use of proceeds earned in which the contractor's labor costs cannot affect the amount of expense to the state.[7]

The Seventh Circuit, in *Metropolitan Milwaukee Assn of Commerce v. Milwaukee County*, *supra*, 431 F. 3d 277, held that it was necessary to

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[6] In one example cited to the Ninth Circuit, a California hospital felt compelled to waive its right to a secret ballot NLRB election immediately after the union filed a complaint against the hospital's use of state funds. J.A. 170.

[7] The *Amici's* citation to the Second Circuit's conflicting holding is not intended to express complete agreement with that court's analysis of all the possible circumstances in which state funding restrictions should be found preempted by federal law. Indeed, to the extent that the Second Circuit would allow states to condition private employers' use of grants in ways that would interfere with rights protected under Section 8(c), that court too has departed from this Court's labor law preemption standards, albeit in a more limited way than the Ninth Circuit.

analyze any possible impact of state funding restrictions that extended beyond the scope of the particular funded program. The court deemed this "spillover effect" to be fatal to any state funding restrictions on otherwise protected employer rights because of the "sheer impracticability of a separation between [government] and other work." AB 1889 unquestionably has the same "spillover effects" on state funding recipients that were present in *Metropolitan Milwaukee,* but the Ninth Circuit ignored them.

The Ninth Circuit's failure to properly analyze AB 1889's coercive impact on the exercise of employer rights in this case directly conflicts with each of the above-referenced circuit court holdings, and with this Court's seminal opinion in *Gould.* The Ninth Circuit's erroneous analysis of the magnitude of AB 1889's impact on private sector labor relations, and the circuit conflict created thereby, constitutes further grounds for reversal by this Court.

C. The Ninth Circuit's Decision Violates This Court's Holdings On Federal Preemption And Threatens To Undermine Enforcement Of The NLRA.

The Ninth Circuit's failure to appreciate the severity of AB 1889's coercive impact on employers led to further error in the appeals court's application of this Court's labor law preemption doctrine to the California law. Having found the challenged statute to constitute "broadly sweeping," non-proprietary regulation of labor relations policy, the Ninth Circuit

should have held that AB 1889 was preempted by the NLRA under this Court's holdings in *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959), and/or *Lodge 76, Int'l Assn of Machinists & Aerospace Workers v. Wis. Employment Relations Comm'n*, 427 U.S. 132 (1976). The Ninth Circuit's failure to find preemption under either *Garmon* or *Machinists* cannot be reconciled with this Court's precedents and again compels reversal.

At the outset, the Ninth Circuit's unanimous finding that AB 1889 is an exercise in regulation, not market participation, is indisputable and should be affirmed. Indeed, to the extent that the Respondents seek to revisit the Ninth Circuit's holding with regard to AB 1889's regulatory status, the Court should if anything conclude that the Ninth Circuit did not go as far as it should have in limiting the scope of the market participation doctrine, based upon this Court's project-specific application of the doctrine in *Bldg. & Constr. Trades Council of the Metro. Dist. v. Associated Builders and Contractors of Mass./R.I., Inc.* ("*Boston Harbor*"), 507 U.S. 218 (1993).[8] In any event, the court of appeals properly

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[8] In *Cardinal Towing & Auto Repair, Inc. v. City of Bedford*, 180 F. 3d 686, 693 (5th Cir. 1999). the Fifth Circuit properly read *Boston Harbor* to require a finding of state regulation unless two factors are *both* present: (1) the law must be found to "essentially reflect the [public] entity's own interest in its efficient procurement of needed goods and services, as measured by comparison with the typical behavior of private parties in similar circumstances" and (2) the law must "have a narrow scope ... [to] defeat an inference that its primary goal was to encourage a general policy rather than address a specific proprietary problem." *Cardinal Towing, supra*, 180 F.3d at 693. The Ninth Circuit needlessly converted this test for market participation into an either/or standard, giving the state two

found that the California law in no way reflects the state's interest in procurement of services in a manner typical of private actors; and the court also found correctly that AB 1889 was not narrowly drafted at all to meet any alleged proprietary purpose. Pet. App. 7a-12a. Thus, the Ninth Circuit's ultimate finding that AB 1889 constitutes regulation of private sector labor relations is plainly correct and should be affirmed.

1. *Garmon* Preemption Applies.

Unfortunately, having found correctly that AB 1889 regulates labor policy with respect to private employers, the Ninth Circuit proceeded improperly to blur the distinction previously established by this Court between permissible state market participation and prohibited state regulation of labor policy. *See Boston Harbor, supra,* 507 U.S. 218 (1993). In the *Boston Harbor* case, this Court declared that the distinction between market participation and regulation was crucial because "preemption doctrines apply ...to state regulation." *Id.* at 229-231. The Court's *Boston Harbor* decision further reaffirmed the Court's previous holding in *Gould*, cited above, that regulatory use of the state's spending power remains preempted. *Id.*

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chances to escape a finding of regulation. Even under this overly generous test, the Ninth Circuit reached the inescapable conclusion that AB 1889 is an act of regulation, because *neither* of the above indicia of market participation is present.

In conflict with this Court's holdings, and despite having found AB 1889 to be "broadly sweeping" in its regulatory nature, the Ninth Circuit's analyzed *Garmon* and *Machinists* in such a way as to uphold AB 1889 in essentially the same manner as if market participation had been present, rendering *Boston Harbor's* distinction meaningless. The court of appeals' reasoning has been aptly described as relying on "extraordinary contortions" to reach the "analytically impossible conclusion" that AB 1889 is clearly regulatory yet not preempted. *See* Garrison and Pettygrove, *"Yes, No, and Maybe": The Implications of a Federal Circuit Split Over Union-Friendly State and Local "Neutrality" Laws*, 23 The Labor Lawyer 121, at 143, 149 (Fall 2007).

Under *Garmon*, this Court has repeatedly preempted regulation of activity that "the NLRA protects, prohibits, or arguably protects or prohibits." *Gould*, 475 U.S. at 286. The theory behind *Garmon* preemption is the protection of the centralized administration of national labor policy. *See Garmon*, 359 U.S. at 242.

Employer communications that fall within the meaning of Section 8(c) of the NLRA are plainly "protected ... or arguably protected" by the Act. As this Court has squarely held: "The enactment of Section 8(c) manifests a congressional intent to encourage free debate on issues dividing labor and management." *Linn v. United Plant Guard Workers of Am.*, 383 U.S. 53 (1966); *see also NLRB v. United Steelworkers of Am.*, 357 U.S. 357, 362 (1958) (referring to non-coercive anti-union solicitation as a "right protected by the so-called 'employer free

speech' provision of Section 8(c) of the [Act]"). The Ninth Circuit failed to address these precedents, and the appeals court's constrained reading of Section 8(c) plainly requires correction by this Court.

The Ninth Circuit declared that non-coercive speech is not "protected" by the NLRA but is instead guaranteed only by the First Amendment. Pet. App. 23a. The Second Circuit gave the proper answer to this unsupported assertion, as follows:

> Many courts, including this one, have affirmed that section 8(c) not only protects constitutional speech rights, but also serves a labor law function of allowing employers to present an alternative view and information that a union would not present.

Id. at 98-99. As the Second Circuit further articulated, the language of Section 8(c) not only was intended to protect employers but also to insure that *employees* had access to information from both sides of the labor debate during any organizing campaign. *Id.* at 99. *See also See also, Metropolitan Milwaukee,* 431 F.3d at 280 (holding that the NLRB grants the right to employers to hold meetings in order to educate employees on the issue of labor representation.); *Americare Pine Lodge Nursing & Rehab. Ctr. v. NLRB*, 164 F. 3d 867, 875 (4th Cir. 1999) ("[P]ermitting the fullest freedom of expression by each party nurtures a healthy and stable bargaining process."); *Southwire Co. v. NLRB*, 383 F. 2d 235, 241 (5th Cir. 1967) ("The guaranty of freedom of speech and assembly to the employer and to the

union goes to the heart of the contest over whether an employee wishes to join a union.").[9]

2. *Machinists* Preemption Also Applies.

Equally misguided is the Ninth Circuit's holding that *Machinists* preemption does not apply to AB 1889. Under *Machinists*, this Court requires preemption of any state regulation of activity that Congress intended to be governed "by the free play of economic forces." 427 U.S. 132, 140. *See also Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 110-11 (1989). The Ninth Circuit nevertheless found that non-coercive employer speech was not intended to be "free from all regulation" under *Machinists* because the NLRB does regulate *coercive* campaign speech. Pet. App. 19a.

Again, the Second Circuit has most cogently explained why the Ninth Circuit has it wrong:

> Because the protection afforded by Section 8(c) is to leave employer speech largely unregulated, in a case involving section 8(c), the *Garmon* doctrine and *Machinists* doctrine actually tend towards the same point: requiring [the state] to respect Congress intent to "leave some activities unregulated," *Machinists*,

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[9] Even the Ninth Circuit has previously declared that "collective bargaining will not work, nor will labor disputes be susceptible to resolution, unless both labor and management are able to exercise their right to engage in uninhibited, robust, and wide-open debate." *Steam Press Holdings, Inc. v. Hawaii Teamsters*, 302 F. 3d 998, 1009 (9th Cir. 2002).

> 427 U.S. 144, so that the parties may resolve their disputes by use of the economic weapons left to them.

Healthcare Association of New York State, Inc. v. Pataki, *supra*, 471 F. 3d at 107. *See also Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724, 751 (1985) ("For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if a state were to declare picketing free for purposes or by methods which the federal Act prohibits.").

As explained above, the Ninth Circuit primarily justifies the state's admitted regulation of employer conduct by returning to the contention that employers are free to forgo the state funds and engage in any speech permitted by the NLRA. Pet. App. 17a. But this ignores the fact that the exercise of state spending power to regulate private sector labor policy results in impermissible conflict with federal labor law by deterring employers in the exercise of their rights under the NLRA. *See Gould*, 475 U.S. at 286. *Healthcare Association*, *supra*, 471 F. 3d at 107; *Metropolitan Milwaukee*, *supra*, 431 F. 3d at 277. *Cf. Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 548 (2001) (restrictions on lawsuits by private grantees deemed unconstitutional even when grantees were free to engage in such lawsuits with their own funds). Plainly, deterrence of protected employer communication with their employees is caused by the broadly sweeping provisions of AB 1889, such that preemption is required.

Finally, the Ninth Circuit plainly erred in relying on the inapposite holding of *Rust v. Sullivan*, 500 U.S. 173 (1991). In *Rust*, this Court upheld certain abortion-related restrictions on the uses of *federal* grants based upon constitutional grounds having no relevance to issues of labor law preemption of state funding restrictions. As the Second Circuit noted, it may well be constitutional for the *federal government* to make a "value judgment favoring conduct other than the exercise of a protected right" and to restrict the use of public funds to exclude that protected conduct, but *Gould* prohibits a state from "leveraging its money to affect the contractor's protected activity beyond the contractor's dealings with the State." As this Court further held in *Gould*, the question of constitutional limits on federal spending "is an entirely different question from what States may do with the [National Labor Relations] Act in place." 475 U.S. at 290. The Ninth Circuit thus committed further error in this case by importing the inapposite Constitutional holding of *Rust* into the unrelated doctrine of federal labor law preemption.

CONCLUSION

For the reasons set forth above and in the Petitioners' Brief, the decision of the Ninth Circuit should be reversed and California's AB 1889 should be found preempted by federal labor law.

Respectfully submitted,

Robert Fried
Thomas Lenz
Atkinson, Andelson,
Loya, Rudd & Romo
5776 Stoneridge Mall Rd.
Pleasanton, CA 94588
925-227-9200

Maurice Baskin
(*Counsel of Record*)
Venable LLP
575 7th St., N.W.
Washington, D.C. 20004
202-344-4823

Counsel for *Amici Curiae*

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In The

Supreme Court of the United States

CHAMBER OF COMMERCE OF THE
UNITED STATES OF AMERICA, *ET AL.*,

Petitioners,

v.

EDMUND G. BROWN, JR., *ET AL.*,

Respondents.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit**

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

ILYA SHAPIRO
Counsel of Record
CATO INSTITUTE
1000 Massachusetts Avenue, NW
Washington, DC 20001
(202) 842-0200

Counsel for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, the Cato Institute publishes books and studies, conducts conferences and forums, publishes the annual *Cato Supreme Court Review*, and files *amicus* briefs with the courts. The instant case is of central concern to Cato because it raises vital questions about the ability of government to burden private citizens' exercise of their First Amendment rights.

STATEMENT OF THE CASE

This is a preemption case arising under the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 151-69. The petitioners argue that the NLRA preempts California Assembly Bill No. 1889 ("AB 1889"), Cal. Gov't Code §§ 16645-49, in relevant part

[1] The parties' written consents to the filing of this *amicus* brief have been lodged with the Clerk of this Court. In accordance with Rule 37.6, *amicus* states that no counsel for either party has authored this brief in whole or in part, and no person or entity, other than the *amicus*, has made a monetary contribution to its preparation.

because it deters an activity – noncoercive speech about union organizing – that federal labor policy protects and encourages.

Specifically, AB 1889 prohibits employers receiving either a state "grant" or over $10,000 from a "state program" from using those funds to "assist, promote, or deter union organizing." Cal. Gov't Code §§ 16645.2, 16645.7. This "use of funds" prohibition even applies to the payment of salaries, *id.* § 16646(a); speaking about unions to employees working on state contracts, *id.* § 16645.3(a); and meeting with employees on certain state property to discuss union-related issues, *id.* § 16645.5(a). It is noteworthy, the petitioners point out, that the significant exceptions to these restrictions all relate to employer speech and use of funds *favoring* union activity. Pet. Brief at 8. The petitioners also detail the various burdens AB 1889 imposes on employers, such as the need to maintain segregated accounting and salary-payment systems. *Id.* at 8-9.

While the petitioners' complaint prays for declaratory and injunctive relief on a variety of grounds, J.A. 122-26, the district court granted partial summary judgment to the petitioners based solely on NLRA preemption. In entering the partial final judgment that underlies this appeal, the court found "sections 16645.2 and 16645.7 to be preempted by the National Labor Relations Act and thus to be invalid under the Constitution's Supremacy Clause." J.A. 349. The court then enjoined the respondents from enforcing the relevant parts of AB 1889 against any

employer covered by the NLRA. *Id.* The court did not state any other basis for its order.

The parties did, however, approve a joint stipulation and order clarifying the issues that the court's partial final judgment teed up for appeal. The parties intended the stipulation to "facilitate a substantive ruling by the appellate court on whether [the relevant parts of AB 1889] are preempted by the [NLRA]." J.A. 352. The parties agreed not to raise any other issues on appeal, including "violation of the First Amendment provided however nothing herein shall preclude the parties from arguing First Amendment principles and case law solely as they relate to the impact or effect on the [NLRA] preemption doctrine." *Id.*

The Ninth Circuit issued three opinions. Ultimately the *en banc* majority reversed the district court not only on preemption grounds but on the First Amendment issue in holding that AB 1889 "does not infringe the First Amendment rights of grant and program recipients." *Chamber of Commerce v. Lockyer*, 463 F.3d 1076, 1096 (9th Cir. 2006). The court found that "California has not 'denied' employers the 'right to engage in [union]-related activity,' but has 'merely refused to fund such activities out of the public fisc.'" *Id.* (citing *Rust v. Sullivan*, 500 U.S. 173, 198 (1991)). The dissent, on the other hand, noted that AB 1889 "abrogates the First Amendment rights of employers to speak out and discuss union organizing campaigns.'" *Id.* at 1098. "Under the guise of preserving state neutrality, the statute operates to impel employers themselves to take a position of

neutrality with respect to labor relations, in direct conflict with employers' rights under the First Amendment." *Id.*

SUMMARY OF ARGUMENT

Amicus believes that 1) this case should be decided on the NLRA preemption grounds that are heavily briefed by the petitioners and other *amici*; but 2) if the Court reaches the First Amendment issue, the statute should be struck because it imposes an unconstitutional condition on the receipt of state funds and burdens private speech in an area unrelated to the programs for which the funds are given.

1. The Ninth Circuit improperly reached the First Amendment issue. The district court order on appeal and the accompanying joint stipulation and order granting the parties' request for partial final judgment specifies that the only issue on appeal is preemption. Moreover, this is a case where the constitutional avoidance canon urges that the First Amendment issue be left alone for further proceedings below.

2. Petitioners have a broad right to speak and engage in expressive association relating to union activity. AB 1889 impermissibly forces private employers to choose between their livelihoods and these First Amendment rights by attaching speech-restrictive strings to State funds. Such conditions on State funds are unconstitutional because California

cannot directly legislate the speech restrictions they represent.

3. AB 1889 impermissibly burdens private speech that is wholly distinct from any programmatic interest the State has in the funding at issue (*e.g.*, Medi-Cal reimbursements and other payments for services rendered on State contracts). The program funds to which California attaches speech restrictions do not seek to advance any related governmental message. AB 1889 is thus not narrowly tailored to advance a State interest more compelling than the petitioners' First Amendment rights.

ARGUMENT

I. THIS CASE SHOULD BE DECIDED ON THE PREEMPTION ISSUE BECAUSE THE PARTIAL FINAL JUDGMENT APPEALED FROM DID NOT CONSIDER CONSTITUTIONAL ISSUES AND THIS COURT SHOULD NOT REACH THEM WHEN A CASE CAN BE DECIDED ON OTHER GROUNDS

We agree with the petitioners on the preemption issue. Although the NLRA contains no express preemption provision, "[i]t is by now commonplace that in passing the NLRA Congress largely displaced state regulation of industrial relations." *Wis. Dep't of Indus., Labor & Human Relations v. Gould Inc.*, 475 U.S. 282, 286 (1986). As concerns this case, the NLRA preempts state regulation of activity: 1) that

Congress intended to remain unregulated, *Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers v. Wis. Employment Relations Comm'n*, 427 U.S. 132 (1976); and 2) that Congress protected, prohibited, or arguably protected or prohibited by the NLRA, *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959). In particular, when Congress amended the NLRA in 1947, it added a provision establishing that "[t]he expressing of any views, argument, or opinion, or the dissemination thereof . . . shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit." 29 U.S.C. § 158(c). This Court has held that "the enactment of [§ 158(c)] manifests a congressional intent to encourage free debate on issues dividing labor and management." *Linn v. United Plant Guard Workers of Am.*, 383 U.S. 53, 62 (1966). As detailed by the petitioners and their other *amici*, this Court should thus find AB 1889 preempted by the NLRA.

More important for our purposes, however, this case should be decided on the basis of preemption *and on that issue alone*. First, the district court order that is the underlying basis for this appeal – technically a "partial final judgment," but essentially an interlocutory ruling certified for appeal – discusses its decision as purely a matter of NLRA preemption. J.A. 348-50. The court refers to its earlier grant of petitioners' motion for partial summary judgment as "find[ing] that California Government Code sections 16645.2 and 16645.7 are preempted by the National Labor

Relations Act" and, at the parties' request, codifies that ruling into an appealable order. J.A. 349. Notably, the joint stipulation and order granting the parties' request for the partial final judgment contains the parties' agreement that the appeal would not raise any issues beyond the above preemption ruling, including "violation of the First Amendment" (though the parties can use First Amendment-related arguments insofar as they relate back to a preemption). J.A. 352. Thus, this Court lacks jurisdiction to consider First Amendment doctrine beyond its tangential applicability to the relevant provisions of the NLRA.

Second, the Ninth Circuit erred when it devoted the third section of its *en banc* opinion specifically to the First Amendment. *Lockyer*, 463 F.3d at 1096 ("III. First Amendment"). This section is not, as the joint stipulation order allows, a discussion of free speech issues as they relate to preemption – as were earlier parts of the opinion, *id.* at 1087-89, 1092 – but a wholesale explanation of why, in the court's view, "AB 1889 does not infringe employers' First Amendment right to express whatever view they wish on organizing." *Id.* at 1096. Although the court claims it is merely responding to arguments raised by the dissent, the appropriate way to handle such arguments – the merits of which we discuss below – would be in a footnote dismissing them as improperly raised given the procedural posture.

Finally, this is a clear example of the long-held canon of statutory construction that constitutional

questions are to be avoided if other interpretations of the statute at issue are available. As the Court said in *Legal Services Corporation v. Velasquez*, 531 U.S. 533 (2001), "when there are two reasonable constructions for a statute, yet one raises a constitutional question, the Court should prefer the interpretation which avoids the constitutional issue." *Id.* at 545 (citing *Gomez v. United States*, 490 U.S. 858, 864 (1989) and *Ashwander v. TVA*, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring)).

In short, assuming *arguendo* that the NLRA itself is constitutional and that the petitioners come under its regulatory jurisdiction, the first question is whether AB 1889 is preempted by the NLRA. Only if it joins the Ninth Circuit in reaching beyond preemption should this Court even consider the First Amendment issues.

II. AB 1889 VIOLATES THE PETITIONERS' PROTECTED FIRST AMENDMENT RIGHTS BY FORCING A CHOICE BETWEEN EXERCISING THOSE RIGHTS AND CONTRACTING WITH THE STATE

If this Court reaches beyond NLRA preemption – if it affirms the Ninth Circuit's application of *Machinists* and *Garmon* – it should still find for the petitioners because the AB 1889 unconstitutionally conditions their receipt and use of State funds on petitioners' renouncement of their First Amendment rights.

A. Broad First Amendment Protection of the Expressive Rights Asserted By the Petitioners Is Essential To Our System of Ordered Liberty

As has long been recognized by this Court, the First Amendment is "the indispensable condition, of nearly every other form of freedom." *Palko v. Connecticut*, 302 U.S. 319, 327 (1937) (Cardozo, J.). The theory of the First Amendment is that "the best test of truth is the power of the thought to get itself accepted in the competition of the market." *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, dissenting). For half a century, this Court has also recognized the right to freely associate in order to advance shared ideas. *See NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 460 (1958). Focusing on the close link between free speech and free assembly, the Court in *Patterson* determined that "freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." *Id.*

Protecting the freedom of speech and the freedom to associate for the purpose of exercising the freedom of speech secures two key benefits. First, it "preserve[es] political and cultural diversity and . . . shield[s] dissident expression from suppression by the majority." *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984). Second, by ensuring wide dissemination of information, it exposes error and allows

individuals and government to avoid unsound ideas more effectively and efficiently, illuminating ideas that might otherwise be ignored. *See, e.g.*, Daniel A. Farber, *Free Speech Without Romance: Public Choice and the First Amendment*, 105 Harv. L. Rev. 554, 557-58 (1991) ("The First Amendment is based on the belief that people will make better decisions if they are more fully informed . . . [and that] [n]ormally, the availability of greater information can only benefit economically rational individuals – the more information individuals have, the more knowledgably they can define their ends, calculate their means, and plan their actions.").

To secure these benefits, the First Amendment rejects a "paternalistic approach" to governance of the marketplace of ideas. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976); Farber, 105 Harv. L. Rev. at 557 n.15. To control the effects of bad speech, the First Amendment therefore counsels not more government regulation, but a larger constellation of private speakers.

The petitioners assert in their complaint that AB 1889 violates the First Amendment in an alarming number of ways. In relevant part: 1) It discriminates based on the content of speech by allowing state funds and property to be used for activities that promote unionization while burdening such expression concerning the merits of (or opposition to) unionization; 2) It requires companies that receive state contracts or grants or otherwise participate in applicable state programs *or even lease state property* to

choose between their right to do so and their free speech rights; 3) It levees a penalty for exercising constitutional rights; 4) It places administrative (and economic) burdens on those who exercise their free speech rights by requiring onerous record-keeping to show that constitutionally protected activities were not funded by state funds; 5) It chills free speech generally because of potential uncertainty over whether a given type of speech is covered by AB 1889; and 6) It imposes a prior restraint on constitutionally protected speech, based on the content of that speech. J.A. 122-23. Each of these, if true, is an impermissible use of state authority in that it empowers the government to shut down any and all opposition to a particular policy – in this case the promotion of unionization (a specific type of speech further protected by the NLRA).

Limiting the ability to speak about unions is just that heavy-handed approach to regulating the marketplace of ideas which the First Amendment was designed to forestall. Unionization may or may not be a good idea for employees depending on the circumstances of employment and the parameters of the proposed union activity. But there can be no doubt that preventing employers from speaking on the matter is an infringement of their most basic rights and undermines our constitutional order.

B. The State Is Not Allowed To Accomplish Through Its Spending Power What It Cannot Do Through Direct Legislation

California cannot directly penalize or restrict noncoercive employer speech, nor can it accomplish that same end through its spending power. For those employers in California receiving all their revenues from the State – most visibly, Medi-Cal providers – AB 1889 represents a total ban on union-related speech. If they wish to apply for, receive, and use State funds dedicated for public purposes and otherwise available to all qualified applicants on a nondiscriminatory basis, they must waive their right to such speech. For those employers who receive partial funding from the State who could in theory continue speaking through the use of non-State revenues, AB 1889 imposes burdensome regulatory requirements, such as the maintenance of separate accounts and time-keeping systems. Lacking a compelling interest in the restrictions that is integral to the programs at issue (*e.g.*, speech restrictions on defense or law enforcement contractors), the State cannot impose such unconstitutional conditions.

In *Perry v. Sindermann*, 408 U.S. 593 (1972), this Court held that the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interest – especially, his interest in freedom of speech." *Id.* at 597. The basis for this conclusion is that otherwise the government could command indirectly "a result which [it] could

not command directly." *Speiser v. Randall*, 357 U.S. 513, 526 (1958). "[I]f the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. . . . Such interference with constitutional rights is impermissible." *Perry*, 408 U.S. at 597.

Here, the State has enacted a statute that does precisely what *Perry* forbids: It denies employers the privilege benefit of contracting with the state if they will not limit their speech in a particular way. Like the mugger who says, "your money or your life," the State puts the employer to a choice between two of his entitlements, his right to participate, if otherwise qualified, in State programs, and his right to speak. He can enjoy one but not both rights. That kind of coercive proposition is the very mark of an unconstitutional condition. It amounts to gratuitous discrimination by the State against those who will not relinquish a right protected by the Constitution.

Finally, that it may be the declared policy of the State of California to encourage unionization is of no moment. As the *Velasquez* Court said, the State "cannot recast a condition on funding as a mere definition of its program in every case, lest the First Amendment be reduced to a simple semantic exercise." *Velasquez*, 531 U.S. at 547. Yet AB 1889 acts to amend the provisions of all State programs, as if each such governing statute contained a new section that restricts speech about unions. AB 1889 must fail

because such amendments add unconstitutional conditions to State program funding.

III. AB 1889 IMPERMISSIBLY BURDENS PRIVATE SPEECH THAT IS DISTINCT FROM ANY STATE PROGRAMMATIC MESSAGE INTEGRAL TO THE PROGRAM FUNDS AT ISSUE

The respondents' admitted – and only discernable – interest in passing this statute is in preventing (noncoercive) employer speech about unions from threatening employee choice. This interest, whether compelling or not, is in no way related to the State programs the use of whose funds AB 1889 regulates. That is, leaving aside that California's prescription for employee choice conflicts with that set up by Congress via the NLRA – which deems *employer* speech essential to informed employee decision-making – the programs whose funds are at issue here (*e.g.*, Medi-Cal) have no inherent union-related message the State has an interest in regulating. Thus, even if the State's interest were compelling, AB 1889 has not narrowly tailored a method of advancing that interest to minimize restrictions on free speech because there is no link between those funds and the State's employee choice message. Instead, by tying *all* state programs to a blanket ban on union-related speech, AB 1889 facially violates the First Amendment.

According to the Ninth Circuit's *en banc* majority, AB 1889 does not infringe employers' First Amendment rights because its speech restrictions are tied to the *use* rather than the *receipt* of funds – so "an employer has and retains the freedom to spend its own funds however it wishes." *Lockyer*, 463 F.3d at 1087-88. The issue is not, however, whether the employer loses *all* rights to speak (about unionization or otherwise), but whether the State can restrict the speech of private employers *at all* solely because they are paid for their work with State funds. Because the State's programmatic interest in the funds at issue ends when they are disbursed, the answer is no. *See id.* at 1099-1100 (Beezer, J., dissenting) ("[The State] has made a bargain for the provision of a limited set of benefits and the vendor has agreed to provide those goods and services, including labor, in exchange for money. Once the exchange has been made and payment has been received, that money can no longer be considered 'state funds.'").

The Ninth Circuit misreads this Court's precedent in cases like *Velasquez* and *Rust* – and thereby misses the two prerequisites for being able to impose speech restrictions on recipients of government funds: 1) The speakers at issue must be either government actors or private actors paid by the government to convey information; and 2) There must be a programmatic message attached to the funding – a certain type of information the money is meant to spread. AB 1889 lacks both of these elements.

In *Velasquez*, this Court overturned a restriction on speech supported by funds that carried no inherent governmental message. *Velasquez*, 531 U.S. at 1051-52 (Kennedy, J.) (Congress cannot forbid use of funds to challenge welfare laws after it appropriates them to organizations assisting indigent clients with, *inter alia*, welfare benefit claims). The case turned on this Court's findings that: 1) the speech at issue was private, rather than governmental speech; and 2) the funding at issue carried no programmatic interest in restricting that speech. *Id.*, 531 U.S. at 548-49 ("Where private speech is involved, even Congress' antecedent funding decision cannot be aimed at the suppression of ideas thought inimical to the government's interest." *Velasquez*, 531 U.S. at 548-59 (citing *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 548 (1983) and *Speiser v. Randall*, 357 U.S. 513, 519 (1958)).

Here, as in *Velasquez*, the government has no programmatic interest in the funds or how they are used (beyond ensuring that they are expended on contracted-for services). Although the government is allowed to regulate speech that delivers its own message, *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995), "[i]t does not follow . . . that viewpoint-based restrictions are proper when the [government] does not itself speak or subsidize transmittal of a message it favors." *Id.* at 541-42 (quoting *Rosenberger*, 515 U.S. at 834). And the petitioners' brief makes clear that AB 1889, while superficially neutral with respect to the type of union-related

speech it regulates, serves only to restrict anti-unionization speech. Pet. Brief at 31-32, 42.

The court below cites *Rust* for the propositions that "a restriction on the use of government funds for an activity does not compel cessation of the activity" and that California has not "denied" employers the right to speak about unions but has "merely refused to fund such activities out of the public fisc." *Lockyer*, 463 F.3d at 1098 (citing *Rust*, 500 U.S. at 198). But, again, the point is not that some employers (those who have revenue streams separate from state program funds *and* are willing to maintain two sets of books) can still speak about unions. Petitioners are harmed here because the State has attached arbitrary speech restrictions to funds not related to State speech.

The *Rust* Court upheld a restriction prohibiting doctors employed by federally funded family planning clinics from discussing abortion with their patients. *Rust*, 500 U.S. at 203. This Court has since explained, however, that the *Rust* counseling activities amounted to governmental speech, sustaining viewpoint-based funding decisions where the government is itself the speaker or where, like *Rust*, the government uses private speakers to transmit information related to its own programs. *Velasquez*, 531 U.S. at 541 (citing *Board of Regents of Univ. of Wis. System v. Southworth*, 529 U.S. 217, 229, 235 (2000) and *Rosenberger*, 515 U.S. at 833). Although the government has the latitude to ensure that its own message is being

delivered, that latitude does not apply to restrictions on purely private speech. *Id.* at 542.

Whereas in *Rust* Congress established a statutory scheme providing grants for the provision of information and services relating to a given issue while at the same time declining to fund "an alternative program which seeks to deal with the problem another way," *Rust*, 500 U.S. at 193, the State of California has done neither with the funds regulated by AB 1889. Thus the *Rust* Court's explanation that Congress had "merely chosen to fund one activity to the exclusion of the other," *id.* (and the Ninth Circuit's corollary about the State not being required to fund private speech out of the public fisc) is inapposite where, as here, the State did not create a program to disseminate information in the first place.

This is neither a case where California funds employer advice on, say, career planning but forbids discussion of unionization nor one where it provides information about workplace regulations but not the regulations governing unions (either of which would make this a *Rust*-like situation). Instead, like *Velasquez*, the State has provided funding containing no programmatic message and then tries to control the speech of the recipients of that funding. Indeed, the instant restrictions are *more* constitutionally odious than *Velasquez*'s: While the latter were at least related to the purpose of the funds – promoting legal claims for welfare benefits – AB 1889 restricts funds paid for State contracts, Medi-Cal reimbursements, and myriad other purposes that have nothing to do

with union-related activities or employee rights under labor law.

In a reversal of the *Rosenberger* scenario – where the State provided grants to promote a diversity of ideas but then discriminated in distributing that funding on the basis of viewpoint, 515 U.S. at 829-30 – AB 1889 restricts private speech unrelated to any message the State funds are designed to convey. As the petitioners argue, "since the State has achieved its fiscal interest by limiting public monies to whatever activities it deems related to the purpose of the government-funded program, the State has no additional fiscal interest in telling private recipients how to spend the money they fairly received in exchange for providing this public service." Pet. Brief at 36.

The State here is not using its funds to speak, disseminate information, or otherwise advance a message about unions. California thus has no relevant programmatic interest in the funds at issue and AB 1889 imposes burdens on speech that do not survive strict scrutiny.

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted,

ILYA SHAPIRO
CATO INSTITUTE
1000 Massachusetts Avenue, NW
Washington, DC 20001
(202) 842-0200
Counsel of Record

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IN THE

Supreme Court of the United States

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, *et al.*,

Petitioners,

v.

EDMUND G. BROWN, JR., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR HEALTHCARE ASSOCIATION OF NEW YORK STATE, INC., NEW YORK ASSOCIATION OF HOMES AND SERVICES FOR THE AGING, INC., NEW YORK STATE HEALTH FACILITIES ASSOCIATION, INC., NYSARC, INC. AND UNITED CEREBRAL PALSY ASSOCIATIONS OF NEW YORK STATE, INC. AS AMICI CURIAE IN SUPPORT OF PETITIONERS

JEFFREY J. SHERRIN
Counsel of Record
CORNELIUS D. MURRAY
JAMES A. SHANNON
O'CONNELL AND ARONOWITZ
54 State Street
Albany, New York 12207
(518) 462-5601

Attorneys for Amici Curiae

QUESTION PRESENTED

Whether California Assembly Bill No. 1889, Cal. Gov't Code §§ 16645.2, 16645.7, is preempted by the National Labor Relations Act.

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This *amici curiae* brief is submitted in support of petitioners.[1]

INTEREST OF AMICI

Healthcare Association of New York State, Inc. ("HANYS") is a not-for-profit trade association which represents over 550 not-for-profit and public hospitals, nursing homes, home health agencies, hospices and other similar health care providers throughout New York State.

New York Association of Homes and Services for the Aging, Inc. ("NYAHSA") is a not-for-profit membership corporation that represents over 650 not-for-profit and publicly sponsored nursing facilities, home care agencies, adult care facilities, assisted living providers, continuing care retirement communities, senior housing facilities, adult day care providers, and other community services agencies serving people of all ages throughout New York State.

New York State Health Facilities Association, Inc. ("NYSHFA") is a not-for-profit trade association whose membership consists of nearly 300 residential health care facilities, which meet the definition of a "nursing facility" as defined in 42 U.S.C. § 1396r(a).

NYSARC, Inc. ("NYSARC") (formerly known as New York State Association for Retarded Children)

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

is a New York not-for-profit membership organization founded by parents, families and friends of persons with mental retardation and other developmental disabilities to provide advocacy to and services for persons with mental retardation. NYSARC is a single corporation that operates statewide through its chapters located in 61 out of 62 New York counties. The county chapters operate a variety of programs that provide services for persons with mental retardation and other developmental disabilities.

United Cerebral Palsy Associations of New York State, Inc., d/b/a Cerebral Palsy Associations of New York State, ("CPNYS") is a New York not-for-profit corporation that directly provides residential, clinical, health, medical, rehabilitation and habilitation education and other services to individuals with developmental disabilities and their families, and serves as a statewide association of providers of like services. As a statewide association, it represents 22 separately incorporated affiliates providing programs and services in every county of New York State. As a direct provider of services, CPNYS itself operates approximately 90 community residences, in addition to day programs and diagnostic and treatment centers providing the full range of health, clinical and habilitative services, and transportation services.

HANYS, NYAHSA, NYSHFA, NYSARC and CPNYS all provide advocacy, education and litigation services for their members. The Amici associations themselves or their members, chapters and affiliates all receive funds to pay for services rendered, some of which funds, at one time, have been appropriated by the State of New York. Principal among such funds are medical assistance ("Medicaid") pay-

ments.

Virtually all of the members of the Amici associations participate in New York's Medicaid program, which comprises federal, state and county funding. Many of Amicis' members receive almost 100% of their funding from the Medicaid program, and all receive very substantial amounts of Medicaid reimbursement. They also receive other funding that might be considered to be "state funds." Amicis' members also receive payments from other governmental bodies, including counties, cities and school districts.

Presently, Medicaid and other payments made to the Amici and their members by the State may be subject to a New York statute, N.Y. Labor Law § 211-a, which operates similarly to AB 1889, and which is the subject of a similar challenge. *See Healthcare Ass'n of N.Y. State, Inc. v. Pataki*, 471 F.3d 87 (2d Cir. 2006). In addition, local counties in New York State in which many of Amicis' members do business have now also enacted local laws that operate similarly to AB 1889, but impose different standards, accounting and reporting rules, and sanctions.

Many of the Amicis' members, particularly hospitals, also treat patients from other states, and bill and receive payment from those states' Medicaid programs. Therefore, they are at least presently, or likely will become, subject to multiple state, county and municipal laws that, like AB 1889, will directly but differently limit or completely defeat their ability to express their viewpoints, or otherwise participate in, union organizing campaigns. The Amici, therefore, have a significant interest in the resolution of

the question whether AB 1889 is preempted by the NLRA.

SUMMARY OF ARGUMENT

AB 1889 is preempted by the National Labor Relations Act (NLRA) because it regulates speech that Congress intended to leave unregulated. That preemption argument, however, will not be made here, because it is fully addressed in Petitioners' and other amicus briefs. Here, Amici assert that AB 1889 is also preempted because it regulates non-coercive and coercive employer speech that are arguably protected or prohibited by the NLRA.

A. AB 1889 is preempted because it regulates speech protected by the NLRA. Section 8 does more than just incorporate First Amendment protections of speech. It creates rules unique to the labor context, as to what speech is protected and what speech may be sanctioned.

B. AB 1889 is preempted because it regulates coercive employer speech that is within the primary jurisdiction of the National Labor Relations Board (NLRB).

C. Absent preemption, AB 1889 and similar laws that have been or could be enacted in other states, counties and municipalities, will result in a patchwork of different governmental restrictions on spending on labor activities that will wreak havoc on the goal of a uniform national labor policy, as embodied in the NLRA.

ARGUMENT

POINT I

AB 1889 IS PREEMPTED UNDER *GARMON*

In *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), this Court stated "[w]hen the exercise of state power over a particular area of activity threatened interference with the clearly indicated policy of industrial relations, it has been judicially necessary to preclude the States from acting." *Id.* at 243. Conduct that falls within the parameters of being protected under section 7 or an unfair labor practice under section 8, is conduct "so plainly within the central aim of federal regulation" that it must be preempted. *Id.* at 244.

Even if it is not clear that an activity is neither protected nor prohibited by the NLRA, "[t]he governing consideration is that to allow the States to control activities that are potentially subject to federal regulation involves too great a danger of conflict with national labor policy." *Id.* at 246. Thus, states may not regulate activity that the NLRA protects, prohibits, or arguably protects or prohibits. *Wisconsin Dep't of Indus., Labor & Human Relations v. Gould Inc.*, 475 U.S. 282, 286 (1986).

A. Protected by the NLRA

1. Section 8(c) Protects Speech

The Ninth Circuit's rejection of *Garmon* preemp-

tion (*Chamber of Commerce v. Lockyer*, 463 F.3d 1076, 1091 (9th Cir. 2006) (*en banc*)) on the ground that section 8(c) provides no affirmative grant of speech rights, views the NLRA too narrowly. The Second Circuit rightly rejected this analysis, emphasizing that section 8(c) is not "a mere place-holder with no labor law function of its own" (471 F.3d at 97), and that section 8(c) does itself protect employer speech, and state action impinging on this protection may be preempted under *Garmon*. *Id.*

It is significant that the form of protection in section 8(c) is stated in the negative - - that non-coercive speech will not constitute an unfair labor practice or be evidence of one. As seen in other contexts, that is a broader protection than one which actually enumerates the types or limits of protected speech. The breadth of the First Amendment's protection of freedom of speech is found in its prohibition of laws restricting speech, not in any affirmative grant itself. U.S. Const. amend. I. The broad powers states draw from the U.S. Constitution are not delineated. They are the reserved powers - - all those not specifically delegated to the federal government under Article I, § 8, or prohibited to the states under Article I, § 10. *See* U.S. Const., Amend. X.

The absence of an affirmative protection of speech is, therefore, inconsequential. The protection of speech found in section 8(c) is a function of the NLRB's jurisdiction to find and remedy unfair labor practices. That the right to freedom of speech derives from the federal constitution does not mean that its exercise is not protected by the NLRA,

through the National Labor Relations Board. Exempting non-coercive speech from constituting or being evidence of an unfair labor practice is a protection of that speech in the broadest possible terms in unfair labor practice proceedings.

2. AB 1889 Regulates Speech

According to Respondents and the Ninth Circuit, if AB 1889 does nothing more than further the State of California's interest in assuring proper use of its own funds, then it does not seek to regulate employer speech at all, and would not be preempted. On the other hand, if the statute does interfere with the employer's ability to participate fully in the election processes, it is preempted under *Garmon*, because even the State's exercise of its spending power does not insulate such interference from a preemption challenge. *Wisconsin Dept. of Indus. Labor & Human Relations v. Gould, Inc.*, 475 U.S. 202, 287 (1986). Thus, the question becomes whether AB 1889 "is aimed at making sure that State funds are only spent on the purposes the State has chosen, or whether, instead, the State has used its spending power to restrict the associations' protected speech beyond their dealings with the State." *Healthcare Ass'n, supra*, 471 F.3d at 102.

Respondents' argument regarding the State's spending power fails for the following principal reasons:

1. AB 1889 has nothing to do with the State's spending power. The money targeted is not the State's funds. It is the employer's, and the only rela-

tionship of these funds with the State is that some of the money that the employer has received was at one time or another paid out of the state treasury. In most cases, particularly in the context of Medicaid programs, employers are reimbursed for items sold or for services already rendered;

2. The only activity that is prohibited by AB 1889 is the expenditure of the employer's own funds on activities that are federally protected, and that further the goals of the National Labor Relations Act;

3. Expenditures by the employer on these labor activities have no effect whatsoever on what the State spends. The State's costs are determined by its contracts, so whether the State is reimbursing for medical care or for the purchase of some other good or service, the State pays the same regardless of how the employer uses its money;

4. The statute does nothing whatsoever to direct how the employer is to use its funds, even state-appropriated funds. The employer can invest it, gamble it away, or give increased wages to union workers. The only thing it cannot do with its money is that which Congress considers to be in the public interest -- to participate in the robust debate encouraged by the NLRA.

Despite the statute being directed at the employer's own funds, despite the statute restricting expenditures of private funds only in the case of activities protected by the NLRA, and despite the statute not requiring expenditures for any specific pur-

pose, the Ninth Circuit relies on *Rust v. Sullivan*, 500 U.S. 173 (1991), for the proposition that "California's refusal to subsidize employer speech" does not regulate employer activity, and employers remain free to use their own funds for advocacy purposes (463 F.3d at 1092).

In *Legal Services Corporation v. Velazquez*, 531 U.S. 533, 541 (2001) this Court clarified its holding in *Rust*, stating:

> The Court in *Rust* did not place explicit reliance on the rationale that the counseling activities of the doctors under Title X amounted to governmental speech; when interpreting the holding in later cases, however, we have explained *Rust* on this understanding. . . . As we said in *Rosenberger*, "when the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee." (internal citations omitted).

AB 1889, like its New York State counterpart, Labor Law § 211-a, disseminates no governmental message. With respect to Medicaid programs, the purpose of the expenditure is not to convey a state message, but to care for the needy, and more specifically, to pay third parties like Amicis' members who provide such care to the needy. The statute is not directed at any state expenditures made to convey a

message that AB 1889's prohibitions are necessary to protect from being garbled or distorted.

Moreover, the existence of a government "subsidy" does not justify the restriction of speech in areas that have been traditionally open to the public for expressive activity or have been expressly dedicated to speech activity. *Rust*, 500 U.S. at 199-200, *citing Hague v. CIO*, 307 U.S. 496, 515 (1939). There can be no doubt that in the category of public forums, the process of unionizing under federal law clearly and unequivocally involves important rights of free speech, adversarial debate and persuasion. *See Virginia Electric & Power Co. v. NLRB*, 319 U.S. 533 (1943); Thomas v. Collins, 323 U.S. 516 (1945), *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).[2]

AB 1889 does not further any state interest of ensuring that state funds are used for the purpose for which they were appropriated, as it only prohibits one type of expenditure and leaves employers free to spend such funds on any other unrelated, or even frivolous, expense. AB 1889 only regulates employer advocacy. Furthermore, AB 1889 has nothing whatsoever to do with how the State spends its money, or

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[2] Both the Second Circuit and the Ninth Circuit erred insofar as they held that *Garmon* preemption could not apply to grant funds (463 F.3d at 1096; 471 F.3d at 105). If the grant defines the purpose for which the funds must be used, then a restriction against use for labor advocacy is meaningless, because the money cannot be used for that purpose anyway. If the grant is not restricted in any way, then imposing a singular restriction on employer advocacy in a labor context, when the funds can be used for any other purpose, whether frivolous or not, amounts to nothing other than a purposeful restriction on employer speech.

how much of it is spent.

The fact is that AB 1889 has no effect upon what goods or services are purchased by the State, nor how much the State pays for those goods and services. The reality is that AB 1889 has nothing to do with the State's spending power. The statute, as does its New York counterpart, Labor Law § 211-a, regulates the employer's spending, and it exercises that control over the employer's own money -- money the employer lawfully and contractually earned by selling some goods or services to the State. The proprietary interest in the funds, therefore, is exclusively the employer's, not the State's. The statute is directed solely at the ability of the employer to advocate in an organizing campaign. The Court in *Lockyer II* (422 F.3d 973 [2005]) accurately recognized that the statute "commandeers employers' own money and dictates to these private employers how they shall spend their money." *Id.* at 980. Thus, AB 1889 is not a statute, as in *Rust*, that conditions receipt of grant funds to further a state's expressed message or program. The challenged provisions do not begin to operate until the funds have been earned by the employer and ownership has changed hands.

Respondents' professed proprietary concerns mask a regulatory decision similar to that held preempted in *Gould*. Here, California is using its legislative power to deter the exercise of federal free speech rights that reflect Congress' and the NLRB's judgment that robust debate fosters informed employee choice. The same speech that Congress sought to safeguard, California attempts to stifle. In

seeking to change labor policy, California has impermissibly assumed a regulating role that is reserved for Congress and the NLRB. *Gould*, 475 U.S. at 291. For that reason, it is preempted under the *Garmon* rationale.

B. Prohibited by the NLRA

Regardless of whether section 8 protects non-coercive speech, there is no doubt that the NLRA prohibits coercive speech. AB 1889 is preempted because it interferes with employer speech that may influence employee decisions. It is the NLRB, however, that has primary jurisdiction to decide whether speech is coercive and to regulate that speech.

The Ninth Circuit's application of the identicality test in *Sears Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180 (1978), is flawed. 463 F.3d at 1092-93. In *Local 926, Int'l Union of Operating Engineers, AFL-CIO v. Jones*, 460 U.S. 669 (1983) this Court considered whether a state cause of action alleging unlawful interference with an employment relationship, and an NLRB charge that rests on coercion, were sufficiently similar to threaten the NLRB's primary jurisdiction.

Distinguishing *Sears*, which dealt with an action for trespass and a challenge only to the location of union picketing, this Court held in *Operating Engineers* that "the federal and state claims are thus the same in a fundamental respect," *id.* at 682, and the "risk of interference with the Board's jurisdiction is

thus obvious and substantial." *Id.* at 683.[3]

As in *Operating Engineers*, the likelihood of overlapping jurisdiction between the NLRB and the California state courts in interpreting and enforcing AB 1889 is evident, as it is commonplace for the NLRB to determine the extent to which speech that "influences" rises to the level of coercion. *See, e.g., Industrial Hard Chrome Ltd.*, 2007 N.L.R.B. Lexis 75 [threats of discharge were unfair labor practices]; *United States Recycling & Disposal, LLC*, 2007 N.L.R.B. Lexis 495 [threatened loss of overtime violated section 8(a)(1)]; *The Levy Co. and Int'l Union of Operating Eng.*, 2007 N.L.R.B. Lexis 531 [statements were influential, but because accurate, were not objectionable]; *Southern Monterey County Hosp.*, 2006 N.L.R.B. Lexis 446 [coercive speech].[4]

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[3] Rejecting the argument that preemption fails because the NLRB proceeding rests on coercion, and the state's claim on causation, this Court stated; "permitting state causes of action for non-coercive interference with contractual relations to go forward in the state courts would continually require the state court to decide in the first instance whether the Union's conduct was coercive, and hence beyond its power to sanction, or non-coercive, and thus the proper subject of a state suit." 460 U.S. at 682.

[4] Compare *Crown Cork & Seal Co. v. NLRB*, 308 U.S. App. D.C. 326 (1994) (employer letter stating that "we will not bring work into this plant -- and our customer will seek other alternatives -- if that work can't be done at a reasonable cost, a cost that allows both of us to make a fair return on our investment" was not an unfair labor practice, because it was based on objective facts) with *Allegheny Ludlum Corp. v. NLRB*, 323 U.S. App. D.C. 6 (1997) (employer newsletter stating that "despite very difficult circumstances in the past, 'the Company found ways to manage the situation without resorting to layoffs of salaried employees' and quoting an interview with a former

AB 1889 is preempted, therefore, because it interferes with the NLRB's primary jurisdiction over activities that are protected or prohibited, or arguably protected or prohibited, by the National Labor Relations Act.

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union member saying 'if it came to a layoff due to a lack of work, the first people to be laid off would be those in a Union,'" was an unfair labor practice because it constituted a threat of layoffs).

POINT II

AB 1889 AND SIMILAR LAWS WILL EVISCERATE THE UNIFORMITY EMBODIED IN THE NATIONAL LABOR RELATIONS ACT

As discussed at Point IV of Petitioners' Brief, the "purpose of the [National Labor Relations Act] was to obtain 'uniform application' of its substantive rules and to avoid the 'diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies.'" *Garner v. Teamsters Union*, 346 U.S. 485, 490." *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144 (1971); *Garmon, supra*, 359 U.S. at 242-43. This Court has recognized the importance of preserving a uniform federal system in analogous contexts. *See FMC Corp. v. Holliday*, 498 U.S. 52, 60 (1990) (holding a Pennsylvania antisubrogation law preempted, because "[a]pplication of differing state subrogation laws to plans would therefore frustrate plan administrators' continuing obligation to calculate uniform benefit levels nationwide."); *United States v. Locke*, 529 U.S. 89, 108 & 111 (2000) (finding a Washington State restriction on oil tankers preempted even though the statute "preserved the role of the States to regulate local ports and waters ... [because] [e]nforcement of the state requirements would at least frustrate what seems to [the Court] to be evident congressional intention to establish a uniform federal regime controlling the design of oil tankers.")

Petitioners accurately predict that, if legislation such as AB 1889 is left unchecked by this Court, the

outcome will be a proliferation of different and potentially incompatible state, county and municipal laws governing activity and advocacy central to NLRA processes. This outcome is not just theoretical; it is being vigorously pursued and effectuated at both the state and local governmental levels.

After AB 1889, drafted and sponsored by the Intervenor California Labor Federation, AFL-CIO (J.A. 306), was enacted by California in 2000, New York passed a different statute in 2002, but which seeks to achieve the same result as AB 1889. As noted above, N.Y. Labor Law § 211-a is being challenged in *Healthcare Ass'n of N.Y. State, Inc. v. Pataki*, 471 F.3d 87 (2d Cir. 2006).[5] Petitioners have already identified several other statutes at footnote 10 of their Brief that are designed to restrict employer speech, almost all of which date from the late 1990s.[6]

Organized labor's efforts have not been limited to the state level, as exemplified by the county ordinance found preempted by the NLRA in *Metropolitan Milwaukee Ass'n of Commerce v. Milwaukee*

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[5] While the New York Legislature does not publish information on the origins of a particular bill as California does, the press reported that New York's legislation was introduced "at the urging of the politically influential Service Employees International Union, which organizes hospital workers, and the 2.5 million member AFL-CIO." *See U.S. Court Rejects California Labor Neutrality Law*, Albany Times Union, Sept. 27, 2002.

[6] An exception is Cal. Welf. & Inst. Code § 4638, enacted in 1982; this statute is distinguishable from the present day initiatives, in that it contains an explicit qualification that "[n]othing in this section shall be construed as limiting the employers rights under Section 8(c) of the National Labor Relations Act." *Id.*

County, 431 F.3d 277 (7th Cir. 2005). While it is much more difficult to conduct a broad search of local ordinances, Amici associations have been able to identify a number of relatively recent local laws which, like AB 1889, seek to deprive employers of the resources necessary to exercise their advocacy rights under the NLRA. They do so, however, using different terms, encompassing different funds, targeting different activities, imposing different reporting and accounting obligations, and threatening different sanctions. These local laws, whose draconian ordinances in some ways exceed AB 1889's, emanate from well-populated counties like Suffolk and Nassau in New York State,[7] to small towns like Fairfax, California, whose population is estimated to be just over seven thousand people.[8]

The 10 local ordinances that the Amici have been able to identify are:

Counties	Law / Ordinance	Year Passed
Allegheny, PA	86-01	2001
Los Angeles, CA	Title 2, § 2.201.050(B)	1999
Marin, CA	Part 3435, § 2.50.130	2005
Nassau, NY	Misc. Laws, Title 56	2003
Santa Cruz, CA	Title 2, § 2.122.130	2001
Suffolk, NY	Part IV, Chapter 466	2003
Ventura, CA	Div. 4, Chp. 9.5, § 4962	2001

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[7] The United States Census Bureau estimates the population of each county as well in excess of 1 million people. *See* Fact Sheets at http://factfinder.census.gov

[8] See United States Census Bureau Fact Sheet at http://factfinder.census.gov

Cities and Towns	Law / Ordinance	Year Passed
Fairfax, CA	Title 8, § 8.56.120	2002
Pittsburgh, PA	Art. VII, § 161.35(l)[9]	2001
Watsonville, CA	Title 2, Chp. 5, § 2-5.13	2002

Thus, the uniformity of the NLRA has been threatened not just by the possibility of 50 different states enacting laws like AB 1889, but also by innumerable counties and cities. Nor would there be any restriction on school districts imposing similar rules, such as for private schools that are funded to meet the districts' obligations to provide free appropriate public education under the Individuals with Disabilities Education Act. 20 U.S.C. §§ 1400 *et seq.*

Organized labor's concerted efforts to use the political process to alter the careful balance of employer and union rights under the NLRA by securing employer neutrality has been well-publicized. *See* Roger C. Hartley, *Non-Legislative Labor Law Reform and Pre-Recognition Labor Neutrality Agreements: The Newest Civil Rights Movement*, 22 Berkely J. Emp. & Lab. L. 369, 373 & 379 (2001):

> Union leaders regard employer anti-union speech as a leading cause of union organizing failure, particularly when orchestrated by labor-management consultants.

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[9] The editor of the compilation of Pittsburgh's code noted that "Am. Ord. 13-2001, §§ 1--17, effective Jan. 1, 2002, amended the Code by adding provisions designated as § 161.33. Inasmuch as there already exist provisions so designated, Am. Ord. 13-2001 has been codified herein as § 161.35 at the discretion of the editor."

...

> One of the most important ways a union secures a neutrality agreement is when a state or local government requires one from a private sector employer.

The reason for this political tact is that "substantial empirical literature in industrial relations establishes employer opposition as a major contributor to union losses in certification elections and, ultimately, to the decline of the unionization rate in the United States." Adrienne E. Eaton and Jill Kriesky, *Union Organizing Under Neutrality and Card Check Agreements*, 55 Indus. & Lab. Rel. Rev. 42, 43, 46-48 (2001).

It is evident that a patchwork of different state and local laws that will impair the ability of participants in the NLRA processes to exercise their full panopoly of rights has not only gained a foothold in the two most populous states and at least 10 local governmental units, but, absent a preemption finding, will undoubtedly spread across the country, leading to the "incremental diminishment" of the Board's control over enforcement of the NLRA that this Court in *Wisconsin Dep't of Indus., Labor & Human Rels. v. Gould, Inc.* 475 U.S. 282 (1986) sought to prevent. The complexities imposed by multiple, inconsistent state and local laws threaten not just the national uniformity of labor relations and the primary jurisdiction of the NLRB, but they also create an enormous burden on employers operating in or deriving payment for goods or services from multiple states or municipalities.

This burden on the NLRA and employers is heightened by the different standards, applicability, reporting and accounting requirements, and sanctions imposed by these various laws. For example, in AB 1889 the operative language is "assist, promote, or deter union organizing," which is defined as:

> ... any attempt by an employer to influence the decision of its employees in this state or those of its subcontractors regarding either of the following:
>
> (1) Whether to support or oppose a labor organization that represents or seeks to represent those employees.
>
> (2) Whether to become a member of any labor organization.

Cal Gov Code § 16645 [10]

In contrast, the operative language of the other existing neutrality laws is as follows:

- Cal Wel & Inst Code § 4638: "directly related to influencing" [not defined].
- New York Labor Law § 211-a(2): "encourage or discourage" [not defined].
- New York Labor Law § 704(11): "to discourage" [not defined].
- New York Soc Serv Law § 336-f(h): "encourage

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[10] At present, these laws are all pro-union, and restrict only employer activity. Absent a finding of preemption, however, nothing precludes states that might be more business-oriented from imposing similar restrictions on union activities instead, so long as they receive, directly or indirectly, some state funds.

or discourage" [not defined].

- ORC Ann. § 5119.62(C): "purpose of influencing"; "influencing" defined as "discouraging employees from seeking collective bargaining representation or encouraging employees to decertify a recognized collective bargaining agent."
- Allegheny County Ordinance 86-01: "support or oppose" [not defined].
- Los Angeles County Code § 2.201.050(B): "to hinder, or to further" [not defined].
- Marin County Living Wage Ordinance § 2.50.130: "to hinder, or to further" [not defined].
- Nassau County Misc. Laws, Title 56, §§2(A), 3: "Assist, Promote or Deter Union Organizing," defined as "any attempt by an employer to influence the decision of its employees in the County of Nassau or those of its subcontractors regarding either of the following: 1.) whether to support or oppose a labor organization that represents or seeks to represent those employees; and 2.) whether to become a member of any labor organization.
- Santa Cruz County Code § 2.122.130: "not hinder or further" [not defined].
- Suffolk County Law §§ 466-2, 466-3: same as Nassau County, *supra*.
- Ventura County Ordinances § 4962: "to hinder, or to further" [not defined].
- Fairfax Municipal Ordinances § 8.56.120: "not hinder or further" [not defined].
- Pittsburgh Code of Ordinances § 161.35(l): "to

support or oppose" [not defined].

- Watsonville Municipal Code § 2.5.13: "not hinder or further" [not defined].

The multiplicity of operative terms used by these state and municipal laws virtually assures inconsistent interpretation and enforcement. Even terms that are similar, *i.e.* "to influence" [AB 1889], "directly related to influencing" [Cal Wel & Inst Code § 4638] and "purpose of influencing" [ORC Ann. § 5119.62(C)], may be interpreted differently by different regulatory agencies and courts in different jurisdictions. This Court has already noted the difficulty of interpreting the term "influence" in *Carlson v. California*, 310 U.S. 106, 109 (1940), in which the Court reviewed on a constitutional challenge a Shasta County Ordinance that prohibited, in relevant part, any picketing:

> ... for the purpose of inducing or influencing, or attempting to induce or influence, any person to refrain from entering any such works, or factory, or place of business, or employment, or for the purpose of inducing or influencing, or attempting to induce or influence, any person to refrain from purchasing or using any goods, wares, merchandise, or other articles, manufactured, made or kept for sale therein ...

The Court noted that "the ordinance requires proof of a purpose to persuade others not to buy merchandise or perform services. Such a purpose could be found in the case of nearly every person engaged in

publicizing the facts of a labor dispute." *Id.* at 112.

These laws also vary widely with respect to their monetary thresholds. Some have no thresholds, *i.e.* Cal Gov Code § 16645.2, Cal Wel & Inst Code § 4638, New York Labor Law § 211-a, New York Labor Labor § 704(11), New York Soc Serv Law § 336-f(h), ORC Ann. § 5119.62(C), Allegheny County Ordinance 86-01, Los Angeles County Code § 2.201.050(B), Marin County Living Wage Ordinance § 2.50.130, Santa Cruz County Code § 2.122.130, Ventura County Ordinances § 4962, Fairfax Municipal Ordinances § 8.56.120, Pittsburgh Code of Ordinances § 161.35(l), Watsonville Municipal Code § 2.5.13, while others have varying minimum monetary triggers for enforcement. *See*, Cal Gov Code § 16645.7(a) [$10,000], Nassau County Misc. Laws, Title 56, § 2(C) [$50,000] and Suffolk County Law § 466-2 [$50,000]. As other states and municipalities adopt their own laws, it will become increasingly difficult for an employer to identify which laws it might become subject to, and what their restrictions are. Nassau and Suffolk, for example, are neighboring counties on Long Island, in New York State, and many of Amicis' members do business with and derive funds, such as Medicaid payments, from both counties. Thus, a hospital on Long Island already has to comply with the different restrictions imposed by the State of New York in Labor Law § 211-a, and also the Suffolk and Nassau counties' ordinances.

There is a similar complication as a result of the terms used by these restrictive laws to define what funds are subject to the restrictions:

- Cal Gov Code §§ 16645.2 & 16645.7: "state

funds".

- Cal Wel & Inst Code § 4638: "state funds".
- New York Labor Law § 211-a: subsection (2) "monies appropriated by the state"; subsection (3) "funds appropriated by the state".
- New York Labor Law § 704(11): "state funding".
- New York Soc Serv Law § 336-f(h): "public assistance funds".
- ORC Ann. § 5119.62(C): "state funds".
- Allegheny County Ordinance 86-01: "tax dollars".
- Los Angeles County Code § 2.201.050(B): "any consideration".
- Marin County Living Wage Ordinance § 2.50.130: "any consideration".
- Nassau County Misc. Laws, Title 56, §2(D): "County Funds" which are defined as "any monies appropriated by the Nassau County Legislature."
- Santa Cruz County Code § 2.122.130: "expenditure".
- Suffolk County Law §§ 466-2: "County Funds" which are defined as "any monies appropriated by the Suffolk County Legislature."
- Ventura County Ordinances § 4962: "any consideration".
- Fairfax Municipal Ordinances § 8.56.120: "expenditure".
- Pittsburgh Code of Ordinances § 161.35(l): "City funds".

- Watsonville Municipal Code § 2.5.13: "expenditure".

The lack of definitions for these terms is especially significant for employers who receive payments from a joint program, such as the Medicaid program. The Medicaid program is a joint state-federal program established by the federal government to provide health services, including long term care services to poor and needy individuals who qualify under certain state and federal requirements. J.A. 118. A state's participation in the Medicaid program is pursuant to Title XIX of the Social Security Act. Medicaid programs are jointly funded, at least by federal and state dollars.[11] J.A. 260. At least in New York State, and likely in California and other Medicaid programs, it is often impossible for an employer to determine, particularly with the accuracy needed to avoid a violation of a provision such as AB 1889, what portion of any particular Medicaid payment is "state funds" attributable to the state and what portion is federal or county funds which are simply processed by the State (*See Healthcare Assn., supra* at 105).

Likewise, the existing restrictive laws also provide for a wide spectrum of possible penalties, which will not only impair an employer's ability to assess the risks associated with the exercise of its rights under the NLRA, but also create such a threat from

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[11] New York has elected to make the counties ("local social services districts") generally responsible for furnishing medical assistance under the Medicaid program, with State and federal contributions towards the cost of such care. *See*, New York Soc. Serv. Law § 365(1).

multiple jurisdictions' penalties over any speech or spending that employers will be completely chilled from participation. The current restrictive laws provide the following penalties:

- Cal Gov Code §§ 16645.2(d) & 16645.7(d): liability to the state for any funds expended in violation of AB 1889 plus a civil penalty equal to twice the amount of those funds.
- Cal Wel & Inst Code § 4635: cancellation of contract.
- New York Labor Law § 211-a(2): liability for the amount unlawfully expended plus a civil penalty in some cases up to, but not to exceed one thousand dollars or three times the amount of money unlawfully expended, whichever is greater.
- New York Labor Law § 704(11): cease and desist order and other forms of administrative relief.
- New York Soc Serv Law § 336-f(h): ineligibility to participate in public assistance employment programs.
- ORC Ann. § 5119.22(K): civil fine of $100-$500.
- Allegheny County Ordinance 86-01: subject to any penalties provided by the rules of County Manager.
- Los Angeles County Code § 2.201.080(B): damages, liquidated damages and/or termination of the contract.
- Marin County Living Wage Ordinance § 2.50.130: subject to any penalties provided by the rules of the County Administrator.

- Nassau County Misc. Laws, Title 56, §7(A): liability for any funds expended in violation of the law, plus a civil penalty equal to twice the amount of those funds, and debarment from county contracts for five years.
- Santa Cruz County Code § 2.122.110: any or all forms of relief and damages.
- Suffolk County Law §§ 466-7: same as Nassau County, *supra.*
- Ventura County Ordinances § 4960: termination of the contract.
- Fairfax Municipal Ordinances § 8.56.100(D): all forms of relief and damages.
- Pittsburgh Code of Ordinances §§ 161.35(i)(2) & 161.22(b)(10): withholding of payment, termination of contract and/or debarment from bidding or participating in City contracts.
- Watsonville Municipal Code § 2.5.11(b): any or all forms of relief and damages.

Further, reporting and accounting becomes an increasingly burdensome responsibility for multi-jurisdictional employees (J.A. 168). Even if the state or municipal law does not require reporting or separate accounts, it becomes a practical necessity to avoid imposition of punitive sanctions. Thus, employers may have to establish separate accounts and/or report for every jurisdiction, state or local, from which they derive funds. The current reporting requirements are as follows:

- Cal Gov Code §§ 16645.2(c) & 16645.7(c): records sufficient to show that no state funds were used in violation of AB 1889, without

time limit.

- Cal Wel & Inst Code § 4639: annual audited financial statement by an independent accounting firm.
- New York Labor Law § 211-a(3): maintain three years of audited financial records.
- New York Labor Law § 704(11): none.
- New York Soc Serv Law § 336-f(h): none.
- ORC Ann. § 5119.62(C): none.
- Allegheny County Ordinance 86-01: none.
- Los Angeles County Code § 2.201.050(B): none.
- Marin County Living Wage Ordinance § 2.50.130: subject to the rules of the County Administrator.
- Nassau County Misc. Laws, Title 56, §3(I): records sufficient to show that no county funds were used in violation of county law, without time limit.
- Santa Cruz County Code § 2.122.110: annual report.
- Suffolk County Law § 466-3(I): same as Nassau County, *supra*.
- Ventura County Ordinances § 4959: subject to the rules of the Ventura County Chief Administrative Office.
- Fairfax Municipal Ordinances § 8.56.100(A): annual report.
- Pittsburgh Code of Ordinances § 161.35(l): none.
- Watsonville Municipal Code § 2.5.11(a): an-

nual report.

Given the acknowledged difficulty employers already face in navigating the labor organizing process,[12] it is not hard to imagine that an employer faced with multiple restrictions such as AB 1889 from different jurisdictions will have any practical choice but to forgo its right to participate in the organizing campaign -- the very aim of such legislation.[13] This is especially true because AB 1889, like many of the other state and municipal laws of this type, restricts the ability of employers to hire consultants and/or attorneys to assist the employer in formulating a legal response to the organizing campaign.[14]

AB 1889 and similar statutes will not only create

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[12] See FN 3, *supra*.

[13] The inherent difficulty of having to comply with multiple recordkeeping requirements is exacerbated by the uncertainty of the standards, applicability and sanctions. For example, an employer that is unsure what actions may fall within the "influence" language of AB 1889 will be over-inclusive in what expenditures are tracked or segregated. If an employer, such as Amicis' members, also receives funding through a joint program such as Medicaid, it may need to keep a separate account for those receipts, as it will be impossible to divide the money according to what is state versus federal or county funds.

[14] *See* Cal Gov Code § 16646; *see also, existing laws:* N.Y. Labor Law § 211-a(2)(b); Allegheny County Ordinance 86-01; City of Pittsburgh Ordinance Art. VII, § 161.35(l); *and proposed state statutes*: H.B. 578, §2(3), 2007 Legis., Reg. Sess. (Ala. 2007); H.B. 3267, §1(b) [definition of "employee influence expenditure"], 185th Gen. Ct., Reg. Sess. (Mass. 2007); H.F. 1224, §2(B)(3), 85th Legis., Reg. Sess. (Minn. 2007); H.B. 492, §1 [proposed amended Section 9-4-5117(a)(3)], 105th Gen. Assemb. (Tenn. 2007).

a patchwork of substantive laws, but will also create inconsistencies in their applicability to any particular employer. For example, while Cal Gov Code § 16645.7 provides a threshold level of $10,000 in state funds in any calendar year, N.Y. Labor Law § 211-a applies to any state-appropriated funds, and Suffolk County Local Law § 466-2 applies to any contractor that receives more than $50,000 in funds.

The reach of the various local ordinances or state laws go well beyond even AB 1889's. As an example, the Suffolk County local law previously referenced not only restricts certain uses of funds received from the County, but also provides that at a minimum, a contractor and its subcontractors will be required to execute a neutrality agreement with any potential organizing union. Significantly, if the services are provided on County property employers are also required to enter into an access agreement, a fair communication agreement, a nonintimidation agreement, and a majority authorization card agreement, as those are defined under Suffolk County Law § 466-2.

Rather than a uniform national labor policy that fosters robust debate, state and local laws will incrementally diminish that uniformity until there is such a patchwork of differing, burdensome and oppressive restrictions on and sanctions for an employer's exercise of its rights under the NLRA that most such debate will be stifled, and the Congressional goals embodied in the NLRA will be eviscerated.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

JEFFREY J. SHERRIN*
CORNELIUS D. MURRAY
JAMES A. SHANNON
O'CONNELL AND ARONOWITZ
54 STATE STREET
ALBANY, NEW YORK 12207
(518) 462-5601

DATED: Albany, New York
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* *Counsel of Record*

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IN THE

Supreme Court of the United States

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, *et al.*,
Petitioners,

v.

EDMUND G. BROWN, JR., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC. AND SHERWOOD COX AS *AMICI CURIAE* SUPPORTING PETITIONERS

GLENN M. TAUBMAN
Counsel of Record
C/O NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC.
8001 Braddock Road
Suite 600
Springfield, Virginia 22160
(703) 321-8510

Counsel of Record for Amici Curiae

January 16, 2008

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Is the State of California's regulation of non-coercive employer speech about union organizing, California Assembly Bill 1889, Cal. Gov't Code §§ 16645.2 and 16645.7, preempted by the National Labor Relations Act, 29 U.S.C. §§ 151-69?

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BRIEF OF THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC. AND SHERWOOD COX AS *AMICI CURIAE* SUPPORTING PETITIONERS

INTEREST OF THE *AMICI CURIAE* [1]

The National Right to Work Legal Defense Foundation, Inc. ("Foundation") is a charitable, legal aid

[1] Pursuant to Supreme Court Rule 37.6, *Amici Curiae* certify that no counsel for a party authored this brief in whole or in part, no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than *Amici*, its members or its counsel made a monetary contribution to its preparation or submission. Pursuant to Supreme Court Rule 37.3(a), *Amici Curiae* state that all parties have consented in writing to the filing of this brief.

organization formed to protect the Right to Work, freedoms of association and speech, and other fundamental liberties of ordinary working men and women from infringement by compulsory unionism. Through its staff attorneys, the Foundation aids employees who have been denied or coerced in the exercise of their right to refrain from collective activity. The Foundation's staff attorneys have served as counsel to individual employees in many Supreme Court cases involving employees' right to refrain from joining or supporting labor organizations, and thereby have helped to establish important precedents protecting employee rights in the workplace against the abuses of compulsory unionism. These cases include: *Davenport v. Washington Education Ass'n*, ___ U.S. ___, 127 S. Ct. 2372, 168 L. Ed. 2d 71 (June 14, 2007); *Air Line Pilots Ass'n v. Miller*, 523 U.S. 866 (1998); *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991); *Communications Workers v. Beck*, 487 U.S. 735 (1988); *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986); *Ellis v. Railway Clerks*, 466 U.S. 435 (1984); and *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977).

Most recently, the Foundation's legal aid program has been at the forefront of exposing the true nature of so-called "voluntary recognition" or "neutrality and card check" agreements, which lie at the heart of this litigation over California's regulations. *See, e.g.*, *Dana Corp.*, 351 N.L.R.B. No. 28 (Sept. 29, 2007); *Dana Corp.*, 341 N.L.R.B. 1283 (2004); *Patterson v. Heartland Indus. Partners, LLP*, 428 F. Supp. 2d 714 (N.D. Ohio 2006), *appeal dismissed as moot*, Case No. 06-3791 (6th Cir. Oct. 25, 2007).

Through "corporate campaigns," boycotts, vexatious litigation and negative publicity, unions increasingly

target employers with pressure to sign "neutrality and card check" agreements. Under many such agreements, employers' speech is silenced, unions are provided with employees' home addresses and other personal information without the employees' knowledge or consent, and secret-ballot elections supervised by the National Labor Relations Board ("NLRB") are waived in favor of so-called "card check recognition." Thereafter, employees are pressured to sign union authorization cards that are counted as "votes" in favor of unionization. These agreements, and the state statutes that mandate or encourage them, strike at the heart of employees' right to choose or refrain from unionization under § 7 of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 157. The California regulations at issue in this case encourage such tactics and even allow state money to be used to pay for them. The Foundation and its supporters want to ensure that this Court understands the manner in which California's state-mandated "neutrality" scheme is enforced and abused to hinder employees' exercise of their § 7 right to choose or reject unionization.

Sherwood Cox is a registered nurse employed by Western Medical Center Santa Ana, an acute care hospital located in Orange County, California. He is affected by the California state law at issue because his employer may be a recipient of state funds. His employer and the California Nurses Association ("CNA") have signed a "neutrality agreement" that grants CNA several exclusive privileges and powers, such as physical access to the workplace and curbs on employer speech. Those powers may enable the CNA–above all other unions–to become the nurses' collective bargaining representative. Mr. Cox has filed numerous unfair labor practice charges with the

NLRB against his employer and the CNA to protect his § 7 rights from abridgement by their neutrality agreement. By filing this brief as *amici curiae*, Mr. Cox seeks to protect his and all other employees' § 7 right to choose or reject unionization in a free, informed and intelligent manner.

STATEMENT OF THE CASE

The *Amici* adopt and incorporate by reference the Petitioners' Statement of the Case.

SUMMARY OF THE ARGUMENT

Assembly Bill No. 1889, Cal. Gov't Code §§ 16645.2 and 16645.7 ("AB 1889"), is the law at issue. It is a state labor regulation that has only one purpose and effect: to halt the free flow of non-coercive information from employers to their employees, so that unions may take advantage of the enforced silence and corral uninformed employees into unionization. AB 1889's "gag rule" directly conflicts with the core of federal labor policy, which encourages the free flow of non-coercive information precisely so that employees can make an intelligent and fully informed decision to choose or reject unionization. Employees are the real victims of this misguided state effort to undo federal labor policy.

AB 1889 enables unions to demand and receive so-called "neutrality and card check" agreements, under which employees' right to choose or reject unionization in a free and uncoerced manner is hampered. For example, most "neutrality and card check" agreements place a gag on employer speech, so that employees are unable to learn from their employer anything that may be unfavorable to the union. Moreover, such agreements typically provide unions with employees' home addresses and other

confidential information, so that union agents can make home visits and other potentially unwanted solicitations as a means to cajole or coerce employees to sign cards. Additionally, unions are often given physical access to the workplace to further pressure employees to sign the cards. Perhaps most egregious, most neutrality agreements waive NLRB-supervised secret-ballot elections and substitute the "card check" process, in which a signed authorization card counts as a "vote" for the union. Thus, the union acts to prevent employees from voting their consciences in a traditional secret-ballot election, even though experience shows that the process of soliciting union authorization cards often relies upon coercion and misrepresentations. *Dana Corp.*, 351 N.L.R.B. No. 28 (Sept. 29, 2007).

Because California's regulations interfere with employees' free choice and their ability to hear the non-coercive speech of their employer about the effects of unionization, AB 1889 must be deemed preempted under both *Lodge 76, International Ass'n of Machinists & Aerospace Workers v. Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976) ("*Machinists*") and *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959) ("*Garmon*").

ARGUMENT

Federal Labor Law Has One Core Policy: Allowing Employees to Choose or Reject Unionization in an Intelligent, Free and Uncoerced Manner. AB 1889 Eviscerates This Policy by Silencing the Non-Coercive Speech of One of the Key Participants in the Debate Over Unionization. For This Reason the Statute Is Preempted under Both the *"Machinists"* and *"Garmon"* Branches of This Court's Preemption Doctrine.

I. Introduction

The provisions of California Assembly Bill No. 1889 and Cal. Gov't Code §§ 16645-16649 ("AB 1889") are state-enforced "neutrality" regulations. Despite their name, however, these regulations are anything but neutral. "[AB 1889] carries a false air of evenhandedness." *Chamber of Commerce v. Lockyer*, 463 F.3d 1076, 1102 (9th Cir. 2006) (*en banc*) (Beezer, J., dissenting) (Pet. App. 44a); *see also Chamber of Commerce v. Lockyer*, 422 F.3d 973, 978 (9th Cir. 2005) (Pet. App. 58a, 64a). This is so because AB 1889 has one true purpose and effect: to halt the free flow of non-coercive information from employers to their employees, so that unions may take advantage of the enforced silence to corral the uninformed employees into unionization. This "gag rule" against one party directly conflicts with federal labor policy, which encourages the free flow of non-coercive information precisely so that employees can make an intelligent and fully informed choice about unionization. Congress intended such non-coercive speech to be left to the free flow of economic forces. *See Linn v. United Plant Guard Workers of America, Local 114*, 383 U.S. 53, 62 (1966) (recognizing the

"congressional intent to encourage free debate on issues dividing labor and management").

The Petitioners' brief ably and correctly demonstrates that the Ninth Circuit's *en banc* ruling upholding AB 1889 is erroneous and conflicts with numerous decisions of this Court, which have found state interference with the NLRA preempted in many circumstances. Here, AB 1889's ban on non-coercive employer speech directly conflicts with longstanding federal labor policy that free speech and debate by all parties is central to the purposes of the NLRA. *Thomas v. Collins*, 323 U.S. 516, 532 (1945) ("The right . . . to discuss, and inform people concerning, the advantages and disadvantages of unions and joining them is protected not only as part of free speech, but as part of free assembly." (citation omitted)); *Linn*, 383 U.S. at 62, *quoting New York Times v. Sullivan*, 376 U.S. 254, 270 (1964) (in a union organizing context, "cases involving speech are to be considered 'against the background of a profound . . . commitment to the principle that debate . . . should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks'"). Indeed, "[a]n overriding principle of the NLRA is that the collective bargaining process cannot function unless both employers and employees have the ability to engage in open and robust debate concerning unionization." *Lockyer*, 463 F.3d at 1105 (Beezer, J., dissenting) (Pet. App. 50a); *see also Lockyer*, 422 F.3d at 978 (Pet. App. 64a).

Unlike two prior panels (Pet. App. 58a & 114a), the *en banc* Ninth Circuit studiously refused to take into account employees' § 7 interest in hearing all sides of the debate when it upheld AB 1889's gags on non-coercive employer speech. The prior panel properly

recognized that "the National Labor Relations Act pivots on the notion that employers and employees may freely discuss their views about union organizing efforts." *Lockyer*, 422 F.3d at 983 (Pet. App. 72a). The prior panel also recognized that:

> The exercise of free speech in these campaigns should not be unduly restricted by narrow construction. It is highly desirable that *the employees* involved in a union campaign should hear all sides of the question in order that they may exercise the informed and reasoned choice that is their right.

Id. at 984, *quoting NLRB v. Lenkurt Elec. Co.*, 438 F.2d 1102, 1108 (9th Cir. 1971) (emphasis added) (Pet. App. 73a).

This common sense desire to effectuate employee free choice, the undisputed core of the NLRA, was echoed in *Healthcare Ass'n v. Pataki* by District Court Judge McCurn, who struck down similar state gags on non-coercive employer speech.

> It is difficult, if not impossible to see, however, how an employee could intelligently exercise such [§ 7] rights, especially the right to decline union representation, if the employee only hears one side of the story–the union's. Plainly hindering an employer's ability to disseminate information opposing unionization "interferes directly" with the union organizing process which the NLRA recognizes.

388 F. Supp. 2d 6, 23 (N.D.N.Y. 2005), *rev'd on other grounds*, 471 F.3d 87 (2d Cir. 2006). In contrast, the Ninth Circuit's *en banc* ruling ignored employees' interests in hearing all sides of the debate over unionization.

The Ninth Circuit's *en banc* ruling was also erroneous when it intimated that *Machinists'* preemption only applies "in the context of collective bargaining between organized labor and employers, not in the context of organizing, which is the subject of AB 1889." (Pet. App. 13a-14a). *See Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608 (1986); *Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers v. Wis. Employment Relations Comm'n*, 427 U.S. 132 (1976). Under this fallacious rationale, a state could ban all organizing yet survive a *Machinists* preemption challenge because it is only regulating "organizing," not collective bargaining. But non-coercive employer speech is vital to employee free choice at every stage of the labor relations process.

Petitioners have also ably demonstrated that the Ninth Circuit's *en banc* ruling is erroneous and in conflict with this Court's other form of labor preemption, the *Garmon* doctrine, in which state regulations even "arguably" covered by the NLRA are preempted. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959); *see also Sears, Roebuck & Co. v. San Diego Dist. Council of Carpenters*, 436 U.S. 180 (1978); *Wisconsin Dep't of Indus., Labor & Human Relations v. Gould Inc.*, 475 U.S. 282 (1986). In upholding California's regulation of free speech in the union organizing context, the *en banc* Ninth Circuit engaged in wordplay when it construed NLRA § 8(c), 29 U.S.C. § 158(c), as providing employers with no affirmative right of free speech, for without such free speech rights the Act could not function as intended. *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 272 (1974) ("Th[e] freewheeling use of the written and spoken word . . . has been expressly fostered by Congress . . . .").

Therefore, the *Amici Curiae* adopt the Petitioners' well-crafted arguments concerning the preemption issues, and will not repeat them here. Instead, *Amici Curiae* will focus on the deleterious impact that statutes like AB 1889 have on employees' § 7 right to freely choose or reject labor unions. The evil of these statutes is not just that they silence one party in order to keep employees in the dark about critical unionization issues, but also that they usher in the use of other "top down" organizing tactics which further tilt the playing field against employees' free choice to accept or reject unionization. Instead of allowing employees' free and informed choice to reign, AB 1889 undermines that choice by exerting pressure on employers to sign "neutrality and card check" agreements and on employees to thereafter accept unionization. The *en banc* Ninth Circuit neither recognized nor protected the core policy of the NLRA—allowing employees to hear all sides of the debate about unionization and then freely to choose their desired course—so its decision must be reversed.

II. Employee Rights Suffer When State and Local Governments Mandate "Neutrality" in Order to Tilt the Playing Field in Favor of Unionization.

"Voluntary recognition agreements" or "neutrality and card check" agreements cover a wide range of topics and behaviors, and there is no single template for these agreements. Some agreements ban NLRB secret-ballot elections in all forms, and some permit them via so-called "consent elections." Some create so-called "private elections" run by an arbitrator or a clergyman. Some agreements ban all employer speech not favorable to the union, and some allow at

least limited employer speech. Most provide the union with physical access to employees in the workplace and lists of employees' home addresses. In some, unions make bargaining concessions in exchange for organizing assistance. Many different neutrality agreements can be viewed at http://www.nrtw.org/neutrality/. But regardless of the particular form, all such agreements have one thing in common: they favor the particular union and "grease the skids" for that union to become the employees' exclusive bargaining representative. AB 1889 does not interfere with any of these decidedly pro-union undertakings, and employers are free to use state money to create and implement such agreements.

Thus, a major vice of AB 1889 is not just that it enforces employer silence, but that it induces employers to capitulate to union demands for "neutrality and card check" agreements. (Pet. 27); *see also Lockyer*, 463 F.3d at 1102 (Beezer, J., dissenting) (Pet. App. 44a) (AB 1889 is "[s]imilar to neutrality agreements . . . ."). Because AB 1889 inexorably leads to union pressure for broader "neutrality and card check" agreements, the Court needs to understand how these agreements actually work and how they diminish or destroy entirely employees' § 7 right to freely choose or reject unionization.

Armed with the powers and leverage AB 1889 provides, unions demand broad "neutrality and card check" agreements from employers. Unions do so because they face a steady decline in the number of employees who voluntarily choose union representation when given a free choice in a secret-ballot election. Financial self-interest has driven unions to search for new ways of acquiring dues paying

members.[2] The AFL-CIO's General Counsel has recommended that unions "use strategic campaigns to secure recognition . . . outside the traditional representation processes." Jonathan P. Hiatt & Lee W. Jackson, *Union Survival Strategies for the Twenty-First Century*, Lab. L.J., Summer/Fall 1996, at 176.

However, employees have fewer legal protections "outside the traditional representation processes," and thus little possibility of protecting their right under § 7 to resist union organizing campaigns targeting them. *See, e.g., Dana Corp.*, 351 N.L.R.B. No. 28 (Sept. 29, 2007); NLRB General Counsel Arthur Rosenfeld's Report on Recent Case Developments, No. R-2544, Nov. 17, 2004, http://www.nlrb.gov/nlrb/press/releases/r2544.pdf. Indeed, the NLRB's most recent statistics show a steep decline in regional offices' intake of representation cases, dropping 25.6% from fiscal year 2005 to 2006, as unions retreat from the "gold standard"—the NLRB secret-ballot election—and rely overwhelmingly on "top down"

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[2] The facts are well known: most unions are desperate for new dues paying members. In 2006, 12.0% of wage and salary workers were union members, down from 12.5% in 2005, according to the U.S. Department of Labor, Jan. 25, 2007, http://www.bls.gov/news.release/union2.nr0.htm. The number of persons belonging to a union fell by 326,000 in 2006, to a total of 15.4 million. The union membership rate has steadily declined from a high of 20.1% in 1983, the first year for which comparable union data is available. For example, in 1982, the Steelworkers union claimed 1.2 million members, but by 2002 the number was 588,000. In 1982, the United Auto Workers claimed 1.14 million members, but by 2002 only 700,000. As of today, only 7.4% of the private-sector workforce is unionized, and the other 92.6% does not appear to be flocking to join. *In re IBM Corp.*, 341 N.L.R.B. 1288, 1306 n.9 (2004).

organizing to secure new recruits. *Effects of NLRB's Landmark Ruling on Supervisory Status Should Become Clearer*, Daily Lab. Rep., Jan. 17, 2007, at S-9.

With California's assistance, unions in this case demand "neutrality and card check" agreements precisely because such agreements limit employees' § 7 rights and hinder those who wish to refrain from unionization. This is demonstrated by these common "neutrality" provisions:

A.) Gag Rule: Although most neutrality agreements purport to require the employer to remain "neutral," in reality they impose a complete gag on all speech not favorable to the union. Even front-line supervisors are prohibited from saying anything about the union or unionization during an organizing drive. Employers must refuse to provide even truthful information in response to direct employee questions about the particular union and its motives and history. Employees are only permitted to hear one side of the story—the version the union officials want them to hear.

In contrast, employees seeking truthful information about a particular union and the effects of unionization in their workplace are entitled to truthful answers from their employer and a full debate, not rote incantations of "we do not oppose the union, and we can say nothing else by order of the State of California." Employer silence demanded by a union and enforced by a state government does not enhance the employees' ability to make a free and informed decision under § 7. Instead, by purposefully keeping employees in the dark and silencing one side of the debate, these gag rules prevent the free flow of

ideas that are critical to informed decision-making and employee free choice.

B.) Special Union Access: Many "neutrality agreements" require that employers provide the union with employees' personal information, such as home addresses and phone numbers, and physical access to the employers' premises. Employees are rarely if ever asked to consent to the release of their personal information.

Armed with broad access to employees in both their homes and workplaces, unions subject employees to relentless group pressure to sign authorization cards. In one recent case, *Hotel Employees & Restaurant Employees Union, Local 57 v. Sage Hospitality Resources, LLC*, 390 F.3d 206 (3d Cir. 2004), employee Faith Jetter attested to this coercion in a sworn Declaration that was filed with the Third Circuit in support of a Motion to Intervene.

> Despite the fact that I had told the union representatives of my decision to refrain from signing the card, I felt like there was continuing pressure on me to sign. These union representatives and others were sometimes in and around the hotel, and would speak to me or approach me when I did not want to speak with them. I also heard from other employees that the union representatives were making inquiries about me, such as asking questions about my work performance. I found this to be an invasion of my personal privacy. Once when I was on medical leave and went into the hospital, I found that when I returned to work the union representatives knew about my hospitalization and my illness. I felt like their knowledge about me and my illness was also an invasion of my personal privacy.

Sadly, these sorts of pressure tactics are the stock-in-trade of union organizers intent on procuring signatures on "authorization cards" from fearful or unsuspecting employees. In another recent NLRB case concerning the enforcement of a neutrality agreement, an employee subject to a "card check" drive by the United Auto Workers ("UAW") attested as follows:

> The UAW put constant pressure on some employees to sign cards by having union organizers bother them while on break time at work, and visit them at home. I believe that the UAW organizers also misled many employees as to the purpose and the finality of the cards. Overall, many employees signed the cards just to get the UAW organizers off their back, not because they really wanted the UAW to represent them.

Declaration of Clarice K. Atherholt in Support of Her Decertification Petition, *Dana Corp.*, 341 N.L.R.B. 1283 (2004).

Given such testimony, it is not surprising that this Court has recognized and condemned the abuses that often occur in the collection of union authorization cards. *See Linden Lumber Div., Summer & Co. v. NLRB*, 419 U.S. 301, 306 (1974). That being said, however, the underlying purpose of state neutrality statutes like AB 1889 is to give unions leverage to demand broad access to all employees in order to perpetrate these abuses.

C.) Waiver of Secret-Ballot Election: Perhaps most egregious, many "neutrality" agreements waive NLRB-supervised secret-ballot elections and substitute the "card check" process, in which a signed authorization card counts as a "vote" for the union. Thus, the union acts to prevent the employees from

voting their consciences in private, even though experience shows that the process of soliciting union authorization cards often relies upon coercion and misrepresentations. *See, e.g., HCF Inc.*, 321 N.L.R.B. 1320, 1320 (1996) (union militant warned an employee that if she did not sign an authorization card "the Union would come and get her children"); *Levi Strauss & Co.*, 172 N.L.R.B. 732 (1968) (misrepresentations can invalidate authorization cards).

Labor union officials and their political allies do not advocate the "card check" process because they sincerely believe that cards or petitions reflect employee sentiment more reliably than a secret-ballot election. Rather, they advocate the card check process because they know that with it they can avoid secret-ballot elections and bring to bear enormous pressure on vulnerable employees to sign the cards. Indeed, an employee's choice against signing a union card does not end the decision-making process for that employee caught in the maw of a "card check" campaign, but instead represents only the beginning of harassment and intimidation. This Court has already recognized this danger.

> We would be closing our eyes to obvious difficulties, of course, if we did not recognize that there have been abuses, primarily arising out of misrepresentations by union organizers as to whether the effect of signing a card was to designate the union to represent the employee for collective bargaining purposes or merely to authorize it to seek an election to determine that issue.

NLRB v. Gissel Packing Co., 395 U.S. 575, 604 (1969); *see also Linden Lumber Div.*, 419 U.S. at

306 (there exists "rational, good-faith grounds for distrusting authorization cards"); *id.* at 315 n.5 (Stewart, J., dissenting) (recognizing "the possibility of undue peer pressure or even coercion in personal card solicitation"); *Brooks v. NLRB*, 348 U.S. 96, 99 (1954) ("an election is a solemn and costly occasion, conducted under safeguards to voluntary choice"). Illicit pressures are magnified when employees are subjected to a "neutrality and card check" agreement that they neither sought nor approved. The NLRB has recently recognized the subtle and not-so-subtle pressures that are applied to employees to get them to sign cards. "Union card-solicitation campaigns have been accompanied by misinformation or a lack of information about employees' representational options." *Dana Corp.*, 351 N.L.R.B. No. 28, slip op. at 6.

This Court and the NLRB have also recognized the greater reliability of secret-ballot elections. *Id.*, slip op. at 5, citing *Gissel*, 395 U.S. at 603. In sharp contrast to the abuses inherent in any "card check" campaign, each employee participating in a NLRB-supervised secret-ballot election makes his or her choice one time, in private. There is no one with the employee at the time of decision. The ultimate choice of the employee is secret from both the union and the employer. Once the employee has decided "yea or nay" by casting a ballot, the process is at an end. "There are no guarantees of comparable safeguards in the voluntary recognition process." *Id.*, slip op. at 6. Yet AB 1889 is designed to undermine this fair and safeguarded secret-ballot election process.

In short, AB 1889 is designed to usher in just these sorts of abuses, under the rubric of "neutrality and card check," to radically tilt the playing field in favor

of unionization and to hinder employees' free choice. The NLRA does not favor such belligerent organizing tactics, and California's efforts to give them life must be rejected.

III. The Proliferation of State "Neutrality" Regulations Destroys the Uniform Application of Federal Labor Policy.

This Court's review of AB 1889 must take into account the factual and legal landscape that exists in California and elsewhere in this country, in which labor unions and their political allies seek to create 50 different state labor laws in order to circumvent various federal rights, protections and strictures of which they disapprove. As an earlier Ninth Circuit panel recognized, laws like AB 1889 are "'part of a state-by-state effort to de facto rewrite the NLRA.'" *Lockyer*, 422 F.3d at 978 n.4. (Pet. App. 64a).

This is demonstrated by the wide variety of "neutrality" regulations that are cropping up in states and municipalities across the nation. *See, e.g., Healthcare Ass'n v. Pataki*, 471 F.3d 87 (2d Cir. 2006); *Metropolitan Milwaukee Ass'n of Commerce v. Milwaukee County*, 431 F.3d 277 (7th Cir. 2005); *Hotel Employees & Rest. Employees Union, Local 57 v. Sage Hospitality Res., LLC*, 390 F.3d 206 (3d Cir. 2004); *Aeroground, Inc. v. City of San Francisco*, 170 F. Supp. 2d 950 (N.D. Cal. 2001).

Therefore, it falls to this Court to ensure that state and local governments do not interfere with the uniform federal labor system crafted by Congress, and, more importantly, with employees' paramount right to choose or reject unionization in a free, informed and educated manner. To allow statutes like AB 1889 to proliferate is to permit the balkanization of federal

labor policy by 50 states and hundreds of municipalities. *See NLRB v. Nash-Finch Co.*, 404 U.S. 138, 146 (1971) (uniform application of federal labor law helps "avoid unseemly conflict" between state and federal authorities).

CONCLUSION

Federal labor policy favors robust free speech and debate about unions and unionization, and abhors "gag orders" and other limits on free speech and the free exchange of ideas. The State of California has no valid interests that trump this core federal labor policy, and its parochial attempt at labor law regulation, AB 1889, must be deemed preempted.

Respectfully submitted,

GLENN M. TAUBMAN
Counsel of Record
C/O NATIONAL RIGHT TO
WORK LEGAL DEFENSE
FOUNDATION, INC.
8001 Braddock Road
Suite 600
Springfield, Virginia 22160
(703) 321-8510

Counsel of Record
for Amici Curiae

January 16, 2008

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~~No. 06-939~~

IN THE

Supreme Court of the United States

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, *et al.*,

Petitioners,

v.

EDMUND G. BROWN, JR., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE STATES OF NEW YORK, CONNECTICUT, FLORIDA, ILLINOIS, IOWA, KENTUCKY, MAINE, MASSACHUSETTS, MINNESOTA, MISSOURI, MONTANA, NEVADA, NEW MEXICO, OHIO, OREGON, RHODE ISLAND, WEST VIRGINIA, AND WYOMING AS AMICI CURIAE SUPPORTING RESPONDENTS

ANDREW M. CUOMO
Attorney General of the State of New York
BARBARA D. UNDERWOOD*
Solicitor General
BENJAMIN N. GUTMAN
Deputy Solicitor General
SASHA SAMBERG-CHAMPION
Assistant Solicitor General
120 Broadway, 25th Floor
New York, NY 10271
(212) 416-8020

* *Counsel of Record*

Attorneys for Amici Curiae

[*Additional Counsel Listed on Signature Page*]

QUESTION PRESENTED

Whether federal law preempts a California law that prohibits employers from using state funds "to assist, promote, or deter union organizing," where the federal government has repeatedly attached similar restrictions to the use of federal funds, and where no federal law either prohibits or protects this employer conduct.

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INTEREST OF THE AMICI STATES

Amici States have an interest in ensuring that federal labor law is not construed so broadly as to preempt their traditional authority to ensure that their grants and other expenditures are not diverted to unintended purposes. Here, California — following the lead of the federal government — has chosen to prohibit the use of state funds for influencing employees' decisions regarding unionization. Other States have enacted or are considering enacting similar laws. For example, New York Labor Law § 211-a bars the use of state funds for, among other things, hiring consultants or training supervisors to influence unionization decisions. Regardless of their policy choices on this specific issue, all States have an interest in avoiding an unwarranted finding of preemption that would limit their control over their own funds.

STATEMENT OF THE CASE

Throughout the 1980s and 1990s, the federal government repeatedly conditioned its disbursement of a variety of federal funds on the recipients' agreement that the money would not be used to assist, promote, or deter union organizing. *See, e.g.*, 29 U.S.C. § 2931(b)(7); 42 U.S.C. § 12634(b)(1); 42 U.S.C. § 9839(e); 42 U.S.C. § 1395x(v)(1)(N); *see also infra* Section B (describing federal laws in more detail). By 1999, such restrictions had become so prevalent that, according to the federal General Services Administration, they amounted to a federal policy "to remain neutral with respect to employer-employee labor disputes." *See* Proposed Rule, 64 Fed. Reg. 37,360, 37,360 (July 9, 1999).

In 2000, California adopted the same policy as the federal government, explicitly modeling its statute on several federal laws.[1] *See* AB 1889 Assembly Bill Analysis, *available at* http://leginfo.ca.gov/pub/99-00/bill/asm/ab_1851-1900/ab_1889_cfa_20000907_102420_asm_floor.html. Like the most recent federal enactments, California's law prohibits an employer from using grant or program funds "to assist, promote, or deter union organizing." Cal. Gov't Code §§ 16645.2, 16645.7. An employer may not use such funds "to influence the decision of its employees in this state or those of its subcontractors" regarding (1) whether to "support or oppose a labor organization that represents or seeks to represent those employees" or (2) whether "to become a member of any labor organization."[2] *Id.* § 16645(a).

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1. Soon thereafter, New York and Florida passed similar restrictions on the use of state money to influence unionization decisions. *See* N.Y. Labor Law § 211-a; Fla. Stat. § 400.334. Equivalent bills were introduced in other states around the same time, but activity on them slowed between the time the California law was enjoined in 2002 and the court of appeals' decision in late 2006. *See* John Logan, *Innovations in State and Local Labor Legislation: Neutrality Laws and Labor Peace Agreements in California*, State of Cal. Labor 196-98 (U. of Cal. Inst. for Lab. & Emp. 2003)(collecting state proposals as of that date), *available at* http://repositories.cdlib.org/ile/scl2003/ch05/.

2. A separate provision puts similar restrictions on the use of state funds obtained pursuant to a contract worth more than $50,000. *See* Cal. Gov't Code § 16645.4. That provision is not at issue in this case, which concerns only restrictions on the use of money obtained through state grants and programs. For that reason and others, the Second Circuit's concerns about restricting an employer's ability to spend profits it derives from, *e.g.*, contracts for soap, *see Healthcare Ass'n of N.Y. State, Inc. v. Pataki*, 471 F.3d 87, 102-05 (2d Cir. 2006), are irrelevant here.

Petitioners filed this action, alleging — among other things — that the California law is preempted by the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151 *et seq.* J.A. 125. The District Court granted petitioners' motion for summary judgment and barred the enforcement of the California law. Pet. App. 149a. The court concluded that the NLRA "manifests a congressional intent to encourage free debate on issues dividing labor and management," and that the California law "would prevent this free debate." Pet. App. 146a-147a (quoting *Linn v. United Plant Guard Workers of Am., Local 114*, 383 U.S. 53, 62 (1966)).

A panel of the court of appeals initially affirmed, Pet. App. 114a-139a, and on rehearing again affirmed, this time over a dissent, Pet. App. 58a-113a. But on en banc review, the court of appeals reversed, holding that the California law was not preempted. The en banc court explained that the NLRA "does not *grant* employers speech rights" that could conflict with the restrictions imposed by the California law on the use of state funds. Pet. App. 23a. Nor does the NLRA treat employer speech regarding unionization as a regulation-free zone that would foreclose state law on the subject. Pet. App. 19a-21a.

This Court granted the petition for a writ of certiorari. 128 S. Ct. 645 (2007).

SUMMARY OF ARGUMENT

Petitioners and their amici ask this Court to find that federal labor law guarantees employers a right to spend government money on influencing employees' unionization decisions, and consequently that state laws restricting such use of government money are preempted. But the NLRA guarantees no such right. To the contrary, the federal government routinely places precisely the same restrictions on how employers can use money it hands out. Although repeatedly asserting that federal law actively encourages employers to weigh in on unionization, petitioners and their amici can produce no statutory or regulatory text that embodies such a policy. Rather, any protection of employer speech derives from the First Amendment, which cannot form the basis of NLRA preemption.

By its terms, section 8(c) of the NLRA confers no substantive rights at all, but merely bars the National Labor Relations Board from considering most speech in ruling on alleged unfair labor practices. The provision's legislative history confirms that it was not intended to confer substantive speech rights, but rather to ensure that the Board respected free-speech rights independently protected by the First Amendment by, *inter alia*, precluding the Board from drawing what Congress believed were undue inferences from employer speech. Thus, federal labor law does not grant *any* right of free speech to employers outside the context of unfair labor practice proceedings, let alone one that can overcome a government's interest in controlling its own expenditures.

Moreover, the federal government has repeatedly imposed on employers who receive federal funds precisely the same restrictions that California imposes on employers receiving state funds. Indeed, in the context of joint federal-state funding programs, the federal government has required states to impose the same restrictions. Far from representing a rejection of federal policy, the challenged California law closely parallels the federal government's own practice.

Petitioners' preemption argument thus is built on a faulty premise. No federal policy is contradicted by this California law or any other state law that puts the same limitation on the use of state funds that the federal government puts on the use of federal funds. Therefore, there is no support for invoking either of the two doctrines this Court has developed to govern federal preemption in the labor-relations context. The federal government's own actions are inconsistent with a finding that Congress intended to create a regulation-free zone for employers' use of government funds to influence employees' unionization decisions, so there is no preemption under *Lodge 76, International Ass'n of Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976) (*Machinists* preemption). And the NLRA neither prohibits nor protects any conduct covered by the California law, so there is no preemption under *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959)(*Garmon* preemption).

Relying on their erroneous characterization of federal law, petitioners and their amici warn this Court that upholding California's law would pave the way for

countless state laws that are inconsistent with federal policy and inconsistent with each other. To the contrary, upholding California's law simply would establish the unremarkable principle that federal labor law does not prevent states from imposing the same limits on employers' use of state funding for unionization-influencing activities that the federal government imposes on employers' use of federal funding. The court of appeals' judgment should therefore be affirmed.

ARGUMENT

THE NLRA DOES NOT PREEMPT STATE LAWS RESTRICTING THE USE OF STATE FUNDS TO INFLUENCE UNIONIZATION DECISIONS

The NLRA contains no express provision preempting state laws that touch on labor relations. Because of the presumption against federal preemption of traditional state powers, *see, e.g.*, *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996), this Court has found the NLRA to preempt state law only when state law actually "conflicts with or otherwise stands as an obstacle to the accomplishment and execution of the full purposes and objectives of the federal law." *Livadas v. Bradshaw*, 512 U.S. 107, 120 (1994) (citation and internal quotation marks omitted); *accord Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985). It has detected such a conflict, and accordingly preempted state laws, where those state laws (1) regulate a matter that Congress intended to be left completely unregulated by any government entity, *see Machinists*, 427 U.S. at 140, or (2) regulate conduct that is arguably prohibited or

protected by the NLRA, and thus intrude on the Board's exclusive jurisdiction over alleged unfair labor practices, *see Garmon*, 359 U.S. at 241-45.

To succeed on their preemption claim under either theory, petitioners must show that the California law at issue somehow conflicts with a federal policy embodied in the NLRA. This they cannot do. Not only does the NLRA advance no policy that is in conflict with the state law, making *Garmon* preemption inapplicable, but Congress has repeatedly advanced the same policy embodied in the state law, thus making clear that this is not an area free of all government restrictions, as would be required for *Machinists* preemption. Barring employers from using government money to influence unionization decisions does not frustrate federal policy in any way, and so preemption is inappropriate here.

A. The NLRA Does Not Confer Upon Employers A Free-Speech Right To Spend Government Funds To Influence Unionization Decisions.

The premise of the preemption argument advanced by petitioners and their amici is that the NLRA affirmatively encourages employers to influence their employees' unionization decisions. *See, e.g.*, Br. for United States at 10 (stating that there is a "uniform federal policy of robust union and employer speech during organizing campaigns"). The NLRA creates a statutory right for employers to speak about unionization, they argue, because Congress and the Board have determined that such employer speech is "essential to informed employee decision-making about union organizing." Pet. Br. at 15-16; *see id.* at 30.

Accordingly, they conclude, a state decision not to subsidize such employer speech evinces a policy that is "diametrically opposed to that of the NLRA," *id.* at 30, is "disruptive of the federal scheme," *id.* at 41, and "deters activity protected by federal labor policy," *id.* at 52.

But this supposed broad speech right for employers does not exist. Its claimed source, section 8(c) of the NLRA, simply limits the sort of evidence that the Board can consider in determining what constitutes an unfair labor practice. Section 8(c) contains no rights-granting language and, by its terms, does not even apply outside the context of unfair labor practice proceedings. Nor does its legislative history support a broader interpretation; rather, its history confirms that it was intended as a check on the Board's ability to draw certain inferences, not as a grant of substantive rights. Finally, this Court has never given section 8(c) a more expansive reading, and indeed has rejected a claim that this provision preempts any state-law regulation of speech pertaining to unionization.

1. Statutory Text

By its terms, section 8(c) is a proviso to the NLRA's declaration that it is an unfair labor practice for an employer or labor union to in any way "restrain" or "coerce" employees "in the exercise of the rights guaranteed in section 7," *see* 29 U.S.C. § 158(a)(1), (b)(1), including the rights "to self-organization" and "to form, join, or assist labor organizations," *id.* § 157. Cabining

the Board's discretion in determining what constitutes a forbidden restraint or coercion, section 8(c) provides:

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

29 U.S.C. § 158(c).

Thus, nothing in the NLRA affirmatively protects non-coercive employer speech as to unionization or otherwise embodies a congressional policy decision that such employer speech should be affirmatively encouraged. Rather, section 8 of the NLRA merely does not actively discourage such employer speech, in that expression that "contains no threat of reprisal or force or promise of benefit" cannot "constitute or be evidence of an unfair labor provision." Section 8(c) does not even preclude the Board from taking the same speech into account for other purposes, such as evaluating the fairness of an election pursuant to section 9 of the NLRA. *See Matter of Gen. Shoe Corp.*, 77 N.L.R.B. 124, 126-27 & n.10 (1948).

By contrast, the NLRA explicitly protects, with unmistakably rights-granting language, a variety of employees' rights, including employees' "right to self-organization" and to "form, join, or assist labor organizations." 29 U.S.C. § 157. As this language indicates, when Congress intended to create a right

under the NLRA, it did so explicitly. Indeed, in considering precisely this question — the preemptive force of section 8(c) — this Court observed that its plain language does not afford "the express protection" to employers that the NLRA gives, for example, to "union members to criticize the management of their unions and the conduct of their officers." *Linn v. United Plant Guard Workers of Am., Local 114*, 383 U.S. 53, 62 n.5 (1966). Moreover, the NLRA includes explicit findings and declarations of policy, *see* 29 U.S.C. § 151, none of which involve encouraging employer speech regarding employees' unionization decisions.

Put differently, if the NLRA did not exist, employers would not lose any speech rights. Section 8(c) does not purport to prohibit all government burdens on employers' speech or other expressive conduct in the way that the First Amendment (through incorporation against the States and municipalities) bars any governmental entity from interfering with protected conduct, *see* Pet. Br. at 24 n.2. It does not even bar the Board from burdening that conduct in other ways, much less prevent any other governmental entity from doing anything. Accordingly, any speech rights employers may enjoy are derived not from the NLRA, but rather from the First Amendment. Nothing in the text and structure of the NLRA even arguably supports the petitioners' claim that there is a strong federal policy of encouraging employer speech regarding unionization, and consequently that state laws limiting the use of state-appropriated funds for that purpose conflict with federal law and must be swept aside.

2. Legislative History

The legislative history of section 8(c) confirms that Congress intended exactly what the provision's plain language would suggest: a restriction on the evidence that the Board can consider in determining whether an unfair labor practice has occurred, not a freestanding right of employers. Congress added this provision to the NLRA as part of the Taft-Hartley Act of 1947 because, despite multiple court rulings that the First Amendment prohibited the Board from punishing employers for non-coercive speech about unionization, the Board continued to use such speech as the basis for finding unfair labor practices.

As originally enacted in 1935, section 8 did not include any limitations on what types of speech, or for that matter any other evidence, the Board could use to find an unfair labor practice. In its very first decision, the Board indicated that it regarded as inherently coercive, and therefore "unfair" within the meaning of the NLRA, "the 'advice' of an employer who has the right to discharge the employee to whom the 'advice' is given." *Matter of Pa. Greyhound Lines, Inc.*, 1 N.L.R.B. 1, 23 (1935), *approved in relevant part*, 91 F.2d 178 (3d Cir. 1937), *rev'd on other grounds*, 303 U.S. 261 (1938). The Second Circuit upheld this construction, finding that "[a]rguments by an employer directed to his employees . . . have a force independent of persuasion," and that accordingly the Board was free to conclude that "[w]hat to an outsider will be no more than the vigorous presentation of a conviction, to an employee may be the manifestation of a determination which it is not safe to thwart." *N.L.R.B. v. Federbush Co., Inc.*, 121 F.2d 954, 957 (2d Cir. 1941) (L. Hand, J.).

But the Board's interpretation was twice rejected by this Court, first on statutory and then on constitutional grounds. This Court first reviewed a Board decision that suggested that a company committed unfair labor practices by posting a bulletin that encouraged employees to deal with the company individually rather than forming a union and by holding meetings at which the employer expressed its views. *Matter of Va. Elec. & Power Co.*, 20 N.L.R.B. 911, 920-23 (1940). This Court remanded to provide the Board an opportunity to elaborate on its findings. *N.L.R.B. v. Va. Elec. & Power Co.*, 314 U.S. 469 (1941). It stated that the Board "has a right to look at what the Company has said, as well as what it has done," in determining "whether the whole course of conduct, evidenced in part by the utterances, was aimed at achieving objectives forbidden by the Act." *Id.* at 478-79. However, it concluded, a finding of coercion would be "difficult to sustain" if based solely on the company's statements. *Id.* at 479. It observed, correctly, that the NLRA does not "enjoin[] the employer from expressing its view on labor policies or problems." *Id.* at 477.

Nonetheless, the following year, the Board once again found that an employer had committed an unfair labor practice by urging its employees not to unionize. It interpreted the Act to require "complete neutrality" on the part of employers, and accordingly found an unfair labor practice on the basis of a finding that the employer acted with the purpose "to influence the result of the election." *Matter of Am. Tube Bending Co., Inc.*, 44 N.L.R.B. 121, 129 (1942). The Second Circuit reversed, finding the facts of the case indistinguishable from those of *Virginia Electric*. *See N.L.R.B. v. Am. Tube Bending Co.*, 134 F.2d 993, 995 (2d Cir. 1943) (L. Hand, J.).

This Court soon clarified that *Virginia Electric* was a constitutional ruling, characterizing its holding as a "recogni[tion] that employers' attempts to persuade to action with respect to joining or not joining unions are within the First Amendment's guaranty." *Thomas v. Collins*, 323 U.S. 516, 537 (1945). It noted that, "[w]hen to this persuasion other things are added which bring about coercion, or give it that character, the limit of the right has been passed." *Id.* at 537-38. However, "short of that limit the employer's freedom cannot be impaired." *Id.* at 538.

Shortly thereafter, the Board found another company to have committed unfair labor practices when it "injected itself into the then pending run-off election." *Matter of Clark Bros. Co., Inc.*, 70 N.L.R.B. 802, 803 (1946). Among other things, the Board found significant that the company conducted "an aggressive campaign against the CIO" that included "anti-CIO leaflets" and "paid advertisements hostile to the CIO." *Id.* In a lengthy dissent, Board member Gerard D. Reilly accused the majority of failing to comply with this Court's precedents.[3] *Id.* at 808-09 (Reilly, Member, dissenting). He detected "a disturbing tendency by the Board to

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3. Reilly helped draft the Taft-Hartley Act. *See* Craig Becker, *Democracy in the Workplace: Union Representation Elections and Federal Labor Law*, 77 Minn. L. Rev. 495, 542 (1993). His frustrations with the Board, as expressed in his *Clark Bros.* dissent, greatly informed the Act, which restrained the Board's discretion as much as it changed substantive law. *See* S. Rep. No. 80-105, at 23-24 (1947) (citing *Clark Bros.* as a decision that was "too restrictive" on employer speech), *reprinted in* 1 NLRB, *Legislative History of the Labor Management Relations Act, 1947*, at 429-30 (1948).

return to its old line of decisions" by finding employer speech to be "part of a 'pattern of coercive conduct,' even in cases where it was clear that the offending speech was only coercive or 'inextricably intertwined' in the most highly metaphorical sense." *Id.* at 811. On appeal, the Second Circuit rejected the Board's reasoning on this point, stating that it was "now authoritatively settled that the constitutional guarantee of free speech entitles an employer to express his views on labor policies and to 'take sides' on issues involved in employee efforts to organize for collective bargaining, provided his conduct as a whole, including his utterances, is not coercive."[4] *N.L.R.B. v. Clark Bros. Co., Inc.*, 163 F.2d 373, 376 (2d Cir. 1947).

It was in this context that Congress debated and passed the Taft-Hartley Act, which amended the NLRA in various ways, including the addition of section 8(c). In addition to making various substantive legal changes, the Act reorganized the Board, which, as it made abundantly clear in the House and Senate committee reports, Congress viewed as insufficiently committed to following judicial precedents or otherwise complying with the law. *See, e.g.*, H.R. Rep. No. 80-245, at 6 (1947) (expressing intent that, "[u]nlike the old Board," the new Board "will not act as prosecutor, judge, and jury" and will "decide the cases, not according to prejudice and caprice, as the old Board so often has done, but according

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4. It nonetheless affirmed the Board's order on the narrower ground that, in the context of "an aggressive anti-union campaign," it was an unfair labor practice for the company to force employees to listen to an anti-union speech an hour before voting, "despite the generally unexceptionable character of the president's remarks." *Id.* at 376.

to the facts"), *reprinted in* 1 NLRB, *Legislative History of the Labor Management Relations Act, 1947*, at 297 (1948) (hereinafter "*Legislative History*"). Accordingly, the Taft-Hartley Act codified certain judicial decisions that Congress believed the Board had ignored. *See, e.g., id.* at 27 (stating that "[i]n cases involving violence in strikes, the Board has seemed reluctant to follow the decisions of the courts," and so "[t]he committee has written into the act the rules that the courts and the Board itself have laid down"), *reprinted in* 1 *Legislative History*, at 318.

In this vein, Congress enacted section 8(c), not to provide employers with free-speech rights beyond those recognized by this Court's First Amendment jurisprudence, but to modify the Board's rules of evidence to ensure that the Board would not be tempted to evade judicial precedent by drawing unfounded and unreviewable factual inferences. "Although the old Labor Board protests it does not limit free speech," the House committee stated, "it is apparent from decisions of the Board itself that what persons say in the exercise of their right of free speech has been used against them." *Id.* at 8, *reprinted in* 1 *Legislative History*, at 299. For example,

> if an employer criticizes a union, and later a foreman discharges a union official for gross misconduct, the Board may say that the official's misconduct warranted his being discharged, but 'infer,' from what the employer said, perhaps long before, that the discharge was for union activity, and reinstate the official with back pay.

Id. at 33, *reprinted in* 1 *Legislative History*, at 324. Allowing the Board to rely on such inferences was especially problematic, the House observed in explaining

why it was changing other Board procedures, because the deferential standard of review of the Board's factual determinations "renders the courts all but powerless to correct the Board's abuses." *Id.* at 41, *reprinted in* 1 *Legislative History*, at 332. Accordingly, "[t]he bill provides that the new Board is prohibited from using as evidence against an employer, an employee, or a union any statement that by its own terms does not threaten force or economic reprisal." *Id.* at 8, *reprinted in* 1 *Legislative History*, at 299.

This approach to ensuring that the Board did not infringe upon employers' constitutional free-speech rights — barring the Board from considering certain evidence — was noted and criticized at the time of the Act's passage. The bill that emerged from the Senate contained no such evidentiary rule, *see* S. 1126 as reported, *reprinted in* 1 *Legislative History*, at 114, and the Senate committee explicitly disclaimed any intent to preclude the Board "from considering such statements as evidence," so long as the statements themselves were not considered unfair labor practices in contravention of judicial precedent, *see* S. Rep. No. 80-105 (1947), at 24, *reprinted in* 1 *Legislative History*, at 430. Several dissenting House committee members complained that the broad evidentiary rule went "far beyond mere protection of an admitted constitutional right." H.R. Rep. No. 80-245, at 84, *reprinted in* 1 *Legislative History*, at 375. Yet it was largely the House version of section 8(c) that was enacted into law. In adopting this version, the bill's conferees expressed their intent to end the Board's practice of "using speeches and publications of employers concerning labor organizations and collective bargaining arrangements as evidence, no matter how

irrelevant or immaterial, that some later act of the employer had an illegal purpose." *See* H.R. Conf. Rep. No. 80-510, at 45 (1947), *reprinted in* 1 *Legislative History*, at 549.

Thus, the authoritative legislative history confirms what already is evident in the text of section 8(c): The provision does not create new substantive rights for employers, but rather creates procedural protections in Board proceedings.[5] These procedural protections, in turn, ensure that the Board, in adjudicating unfair labor practice allegations, does not infringe upon substantive rights of employers — *i.e.*, their constitutional free-speech rights — that preexisted the Act.

The United States portrays section 8(c) as granting a substantive right, but fails to grapple with any of this history. Rather, the United States relies solely on (1) the Senate Report's statement that the amendment "would insure both to employers and labor organizations full freedom to express their views to employees on labor matters" and (2) a stray floor statement by an individual senator, who opined that the bill made employers' speech rights "coextensive with the rights which labor unions enjoy." *See* Br. for United States at 3 (quoting S. Rep. No. 80-105, at 23, *reprinted in* 1 Legislative History, at 429); *id.* at 12 (same); *id.* at 15 (quoting 93 Cong. Rec. 4143 (1947) (statement of Sen. Ellender), *reprinted in*

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5. Although the Second Circuit mistakenly commented that if section 8(c) conferred no substantive rights it would be "a mere place-holder with no labor law function of its own," *Healthcare Ass'n*, 471 F.3d at 97, in fact, as the provision's drafters recognized, its procedural protections have considerable practical value to employers in proceedings before the Board.

2 *Legislative History*, at 1077). But because the Senate's version was not adopted by the conferees, those parts of the legislative history have questionable relevance to interpretation of the bill that was enacted. Moreover, legislative history cannot confer on employers a right appearing nowhere in the statutory text. *Cf. Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 126 S. Ct. 2455, 2459 (2006). And even if the quoted comments could somehow be taken to inform the interpretation of the law that was enacted, they offer little support to petitioners' interpretation. Both statements are fully consistent with congressional intent to ensure that the Board did not infringe upon a pre-existing constitutional right rather than to create a new statutory right.

3. This Court's Precedents

Nor, finally, has this Court ever interpreted section 8(c) as conferring a substantive protection upon employers. To the contrary, it has made clear that any right employers may have to influence their employees' unionization decisions derives from the First Amendment. Meanwhile, it has correctly interpreted section 8(c) as a rule of evidence that requires that certain evidence be excluded in determining whether an unfair labor practice has been committed. *See, e.g., N.L.R.B. v. Exchange Parts Co.*, 375 U.S. 405, 410 n.3 (1964) (in keeping with section 8(c), Court put "no reliance [on] words of the respondent dissociated from its conduct").

Petitioners and their amici suggest otherwise by quoting selectively from *Linn*. That case held that section 8(c) does not preempt a state-law libel action stemming from speech regarding unionization, although false statements made in that context could form the basis of Board action, because the state courts and the Board would not "act at cross purposes."[6] 383 U.S. at 67. It "acknowledge[d] that the enactment of § 8(c) manifests a congressional intent to encourage free debate on issues dividing labor and management." *Id.* at 62. But it then pointed to the actual "wording of the statute," which made it "more likely that Congress adopted this section for a narrower purpose, *i.e.*, to prevent the Board from attributing anti-union motive to an employer on the basis of his statements." *Id.* at 62 n.5 (citing House Report). And this Court contrasted the text of section 8(c), which does not include rights-conferring language, with that of 29 U.S.C. § 411, which explicitly provides a "bill of rights" for employees. *Id.*

Nor can petitioners find support in *Linn*'s statement that "cases involving speech are to be considered 'against the background of a profound . . . commitment to the principle that debate . . . should be uninhibited, robust, and wide-open,'" 383 U.S. at 62 (*quoting N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964))(ellipses in *Linn*). *Linn* made it clear that this commitment to free speech — as well as the quotation in question — originated in the First Amendment doctrine and not, as petitioner

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6. To avoid any potential for conflict with Board adjudications, any libel cause of action stemming from speech regarding unionization must require a finding of actual malice, a standard similar to that adopted by the Board for unfair labor practices. *See* 383 U.S. at 64-65.

suggests, the labor law, *see* Pet. Br. at 21. And in characterizing *Linn* in a later case, this Court observed that the alleged violation of state law there did not "involve[] protected conduct" under the NLRA. *See Sears Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 204 (1978).

Similarly, to the extent that *N.L.R.B. v. Gissel Packing Co., Inc.*, 395 U.S. 575 (1969), bears on this case, it is inconsistent with petitioners' interpretation that section 8(c) creates substantive rights for employers. In *Gissel*, this Court upheld a Board determination that certain statements made by an employer during a unionization drive, such as that unionization would likely lead to plant closures, constituted unfair labor practices. *Id.* at 616-20. It did not state that Congress "firmly established" an employer's right to speak, *see* Br. for United States at 13, but instead made it clear that such a right was established by the First Amendment. 395 U.S. at 617. Indeed, it stated that section 8(c) "merely implements the First Amendment" by keeping certain statements out of evidence. *Id.*

In short, the statutory right claimed by petitioners and their amici — the right of employers to communicate freely with employees for the purpose of influencing unionization decisions — is not found in the Unites States Code, the legislative history of section 8(c), or this Court's precedents. Thus, petitioners are simply mistaken in claiming that it is "indisputable" that direct regulation of employer speech regarding unionization would be preempted by the NLRA, *see* Pet. Br. at 14. The NLRA does not protect such speech. Any right of employers to speak in this context derives from the First Amendment, not the labor law, and so cannot form the basis of NLRA preemption.

B. State Laws Restricting Employer Influence Over Unionization Decisions Are Fully Consistent With Federal Policy.

Not only is there no federal law embodying the supposed federal policy of encouraging employer speech in the run-up to a unionization vote, but the federal government has many times attached to its grants and programs the same condition that California has attached here — *i.e.*, a requirement that an employer not spend government funds taking sides in union organization campaigns. Indeed, it has encouraged and even required the States to disburse money in this precise manner.[7]

In 1980, a House subcommittee, after extensive hearings regarding employer attempts to influence unionization decisions, declared that government money should not be spent on such activity. Such use of government money, it found, "violates the well established federal policy of neutrality on the issue of unionization." Subcomm. on Labor-Management Rel., Comm. on Educ. & Labor, U.S. House of Reps., *Pressures in Today's Workplace*, 96th Cong., at 41 (1980).

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7. That the federal government also attaches other conditions to its grants and programs does not distinguish these laws from California's, *see* Br. for United States at 20. California likewise attaches other conditions to many of its expenditures. *See, e.g.*, 11 Cal. Code Regs. § 463 (prohibiting funds from being used for variety of purposes); 27 Cal. Code Regs. § 10017(b) (barring use of funds for lobbying or "intervention in state or federal regulatory proceedings"); Cal. Gov't Code § 11015 (barring state funds from being spent on membership or participation in any organization whose membership practices are discriminatory).

Spending government money in such fashion is not only wasteful, but "flies in the face of the national labor policy 'to *encourage* the practice and procedure of collective bargaining' as articulated in the National Labor Relations Act." *Id.* The subcommittee "strongly encourage[d]" federal and state governmental entities alike to follow the lead of the Department of Health, Education and Welfare — which had recently clarified that Medicaid funds could not be used for this purpose — and "clearly and emphatically state that public funds earmarked for a particular use are not to be expended to influence workers about unionization," *id.* at 41. It stated its own intention to "pursue the issue of government contract money being used to underwrite an anti-union campaign." *Id.*

In the years since, Congress and the federal agencies have repeatedly followed the subcommittee's recommendation. For example, entities receiving federal Workforce Investment System ("WIS") money must provide the Secretary of Labor with "assurances that none of such funds will be used to assist, promote, or deter union organizing." 29 U.S.C. § 2931(b)(7). In particular, for States to receive WIS funds, they must establish procedures that allow them to adjudicate promptly violations of the WIS requirements, including the union organizing requirement. *Id.* § 2931(c)(1); *see* 70 Fed. Reg. 19,206, 19,218 (Apr. 12, 2005) (requiring participating State to "assure[]" that no funds will be used to "assist, promote, or deter union organizing").

Similarly, States are charged with administering National and Community Service grants, *see* 42 U.S.C. § 12638, money that may not be used to "assist, promote, or deter union organizing," *id.* § 12634(b)(1). Beneficiaries

of the Senior Community Service Employment Program, including States, also must ensure that such funds are not used for the same purposes. 20 C.F.R. § 641.839. The Department of Labor has noted that the latter regulation ensures that its policy is consistent with respect to these two programs. *See* Notice of Proposed Rulemaking, 68 Fed. Reg. 22,520, 22,537 (Apr. 28, 2003).

The federal government likewise requires that Head Start funds "shall not be used to assist, promote, or deter union organizing." 42 U.S.C. § 9839(f). The same restriction applies to federal Migrant and Seasonal Farmworker money. *See* 20 C.F.R. § 633.19(d). And the Medicare Act provides that, "[i]n determining reasonable costs" — *i.e.*, those for which a provider can receive reimbursement — "costs incurred for activities directly related to influencing employees respecting unionization may not be included." 42 U.S.C. § 1395x(v)(1)(N). This statutory provision restates the position of the Health Care Financing Administration, which had accomplished the same result by regulation. *See* Final Notice, 46 Fed. Reg. 3983 (Jan. 16, 1981). Similar conditions were attached in the 1980s to federal grants that no longer exist, such as block grants for implementing the Aid to Families with Dependent Children program. *See, e.g.*, Final Rule, 54 Fed. Reg. 42,146 (Oct. 13, 1989).

These federal laws cannot be dismissed as a product of particular statutes and a particular time (the 1990s), as petitioners contend, *see* Pet. Br. at 40-41 n.7. To the contrary, these laws have been enacted steadily since the 1980 subcommittee report.

Indeed, shortly before California passed the law in question here, the federal General Services Administration explicitly declared that denying government funding to influence unionization decisions is "in furtherance of the Government's long-standing policy to remain neutral with respect to employer-employee labor disputes."[8] *See* Proposed Rule, 64 Fed. Reg. 37,360, 37,360 (July 9, 1999). And the federal government as an employer has a longstanding policy of neutrality with respect to union organizing campaigns. *See Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers, AFL-CIO v. Austin*, 418 U.S. 264, 276-77 (1974). By contrast, the federal government has never — until now — claimed that it is federal policy that employers must be permitted to spend government funds to influence employees' unionization decisions.

Thus, in enacting the statute at issue in this case, California did no more than mimic the policy of the federal government. The federal government has spoken in a variety of ways — sometimes placing restrictions

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8. The agency made this statement in the course of promulgating regulations that, among other things, barred unionization-related expenses from allowable costs with respect to all government contracts. *See* Final Rule, 65 Fed. Reg. 80,256 (Dec. 20, 2000). It subsequently stayed the entire package of regulations, *see* Interim Rule, 66 Fed. Reg. 17,754 (Apr. 3, 2001), and then repealed them, *see* Final Rule, 66 Fed. Reg. 66,986 (Dec. 27, 2001). These later actions were largely based on concerns that a separate, controversial requirement that the federal government "black-list" contractors that failed to comply with various laws was "unworkable" in practice. *See id.* at 66,988. They contain no indication of any disagreement with the original statement that it is the federal government's policy not to fund employers' activities relating to unionization.

on the use of grant money, other times limiting the costs that can reimbursed — but its message has always been the same: employers may not use government funds to influence unionization decisions.[9] There is no basis for concluding that there exists a general federal policy of using government money to fund employers' attempts to influence unionization decisions, to which these restrictions are the "tailored exceptions," *see* Br. for United States at 19. To the contrary, every time the federal government has spoken in this area, it has consistently found that influencing unionization decisions is an inappropriate use of government funds. As the House subcommittee first stated and the General Services Administration reaffirmed two decades later, restricting such use of government funds is not the exception to the federal policy — it is the rule.

Of course, respondents need not establish the existence of a federal policy identical to the challenged California policy to defeat federal preemption. Rather, it is petitioners' burden to establish that there exists a contrary federal policy. That the federal government's actions have been consistent with California's for more than two decades strongly suggests that petitioners cannot meet that burden.

It is true, as petitioners note, that appropriations measures should not be construed so as to implicitly repeal or modify laws of general application. Pet. Br. at

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9. Petitioners contend that the form of the restriction is relevant to whether a State is regulating or acting as a market participant, *see* Pet. Br. at 36. They do not contend that it is relevant to whether a state law is substantively incompatible with federal policy.

40 n.7. But it is not amici States who contend that later Congresses have repealed or modified a free-speech right created by the NLRA. Rather, it is petitioners and their amici who ask this Court to find that Congress has repeatedly, and sub silentio, modified the workings of the NLRA with respect to a myriad of government programs. There is no indication that Congress has ever seen any such tension between its actions and the NLRA, further signifying that the supposed statutory right to use government money to influence unionization activities never existed. "The fact that Congress itself has thus imposed the same type of restriction . . . is surely evidence that Congress does not view such a restriction as incompatible with its labor policies." *De Veau v. Braisted*, 363 U.S. 144, 156 (1960) (plurality opinion). That is particularly true here, where Congress's own actions are the *only* evidence of its intent in this regard, there being no statutory indicia of Congress's supposed determination "that robust employer speech enhances employee choice and contributes to fair elections," Br. for United States at 10.

Given the close fit and complementary relationship between federal policy and the California law at issue here (as well as the similar laws of other States),[10] there is no merit to petitioners' slippery-slope argument that upholding California's law "would allow for the balkanization of labor law in the United States, with

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10. Far from contending that the states have enacted diverging policies, petitioner concedes that every such state law enacted or considered so far is "materially identical," Pet. Br. at 55-56.

states free to pursue their own idiosyncratic labor policy goals," Pet. Br. at 16. No such balkanization is presented on the facts of this case. Instead, denying preemption would simply establish the straightforward proposition that States are entitled to attach the same labor-related conditions on the use of their funds that the federal government does on its own. Just as there is "no reason to believe that for this purpose [NLRA preemption] Congress intended state minimum labor standards to be treated differently from minimum federal standards," *Metro. Life Ins. Co.*, 471 U.S. at 755, so there is no reason to believe that Congress intended to disable States from putting the same conditions on the use of state funds that the federal government regularly puts on the use of federal funds.

C. *Machinists* and *Garmon* Do Not Apply Here, Because the State Law Neither Regulates an Area Meant To Remain Entirely Unregulated Nor Conflicts With Any Federal Policy.

Because there is no federal policy of encouraging employer speech regarding unionization, and because employer use of government funds to pay for speech has long been subject to extensive regulation, there is no rationale for federal preemption of the California statute at issue here.

1. *Machinists* Preemption

There is no basis for finding *Machinists* preemption, which prohibits "state and municipal regulation of areas that have been left 'to be controlled by the free play of economic forces.'" *Bldg. & Constr. Trades Council of the*

Metropolitan Dist. v. Associated Builders & Contractors of Mass./R.I., Inc., 507 U.S. 218, 225 (1993) (quoting *Machinists*, 427 U.S. at 140). The premise of *Machinists* preemption is that state regulation in an area of labor law that Congress deliberately left unregulated would upset the federal law's "intentional balance between the uncontrolled power of management and labor to further their respective interests." *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 614 (1986) (internal quotation marks omitted). Congress has made no such intentional decision to leave employers free to spend government funds to influence employees' unionization decisions.

Congress has not exempted noncoercive employer speech regarding unionization from "all government regulation," Pet. Br. at 22, but rather has simply declared that such speech cannot form the basis of an unfair labor practice. Meanwhile, it has repeatedly limited employers' ability to spend government funds in precisely the same manner as the California law, and has sometimes required the states to do the same in disbursing block grants. Even where those federal provisions do not apply, Congress requires the disclosure of certain employer expenditures on consultants for the purpose of influencing employees regarding unionization. *See* 29 U.S.C. § 433. And, as the United States concedes, the Board itself regulates employers' speech during union elections in several ways. *See* Br. for United States at 22.

Thus, rather than creating a no-regulation zone, Congress has extensively regulated in this area, including (but not limited to) imposing limitations on the

use of federal money that are analogous to the limitations on the use of state money challenged here. In addition, this Court already has upheld the application of state libel law to speech regarding unionization, *see Linn*, 383 U.S. at 63, a holding difficult to square with petitioners' claims that Congress has ousted states from *any* regulatory authority over this conduct, as *Machinists* requires.

Finally, the very premise of *Machinists* preemption — that Congress itself would have regulated this activity had it intended such regulation to be in place, and so allowing the States to regulate would upset the balance intentionally struck by Congress — is lacking here. That is because Congress has no authority to tell states how to distribute state funds, except in the context of joint federal-state funding programs. Thus, it cannot be said that Congress has deliberately left unregulated employers' ability to use state funds to discourage unionization.

2. *Garmon* Preemption

There similarly is no basis to apply *Garmon* preemption, under which state laws that may conflict with the federal labor law scheme are preempted. Such conflicts arise where "the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8." *Garmon*, 359 U.S. at 244. "Thus the first inquiry, in any case in which a claim of federal preemption is raised, must be whether the conduct called into question may reasonably be asserted to be subject to Labor Board cognizance." *Linn*, 383 U.S. at 60 (citation and internal quotation marks omitted).

Here, California's law does not substantively conflict with any federal rule of law, as no federal statute protects the covered activities or otherwise indicates a policy that would conflict with California's. Rather, "Congress has expressly addressed the question" multiple times of whether employers should be permitted to spend government money to influence unionization decisions, *N.Y. Tel. Co. v. N.Y. State Dep't of Labor*, 440 U.S. 519, 544 (1979) (plurality opinion), and never has it suggested that an employers' right to do so was already protected "by an implicit federal rule of law," *id.* at 545. Nor does the NLRA prohibit the covered employer conduct. Rather, the conduct at issue is simply not "subject to Labor Board cognizance," *Linn*, 383 U.S. at 60, and so state regulation of it implicates no concerns warranting preemption.

There is no merit to petitioners' argument that the NLRA should be seen to "protect" employer speech simply because it does not "prohibit" it, *see* Pet. Br. at 24 n.2. Petitioners implicitly ask this Court to extend *Garmon* preemption beyond where Congress has affirmatively protected or prohibited certain conduct, *see, e.g., Wis. Dep't of Indus., Labor & Human Rels. v. Gould Inc.*, 475 U.S. 282, 286 (1986), to where Congress has not acted at all. This is a breathtaking expansion of *Garmon* doctrine, and one that would swallow the entire field of labor regulation. This expansion is evident from the Second Circuit's correct realization that it was applying *Garmon* so broadly that "the *Garmon* doctrine and the *Machinists* doctrine actually tend toward the same point." *Healthcare Ass'n*, 471 F.3d at 107. This finding — that the NLRA simultaneously regulates conduct in a way that conflicts with the California law

and intentionally leaves the same conduct entirely unregulated — collapses the conceptually distinct *Garmon* and *Machinists* doctrines. And it leaves no room at all for the States to regulate conduct that touches on labor relations, a conclusion that cannot be reconciled with this Court's precedents. *See, e.g., Amalgamated Ass'n of Street, Electric Ry. & Motor Coach Employees of Am. v. Lockridge*, 403 U.S. 274, 289 (1971) ("We cannot declare pre-empted all local regulation that touches or concerns in any way the complex interrelationships between employees, employers, and unions; obviously, much of this is left to the States.").

Apparently recognizing this problem, the United States advances the much narrower claim that *Garmon* preempts only regulation of speech that is coercive in nature — *i.e.*, speech that the federal law actually prohibits.[11] *See* Br. for United States at 21. It claims, incorrectly, that the California law "compels state courts to usurp the functions of the Board" by incidentally regulating coercive speech as well as non-coercive speech, *see id.* at 24. But administration of the state law does not "interfere[] with the Board's ability to adjudicate controversies committed to it by the Act," *Metro. Life Ins. Co.*, 471 U.S. at 748 n.26, because the state law does not require any determination, such as whether speech is coercive or non-coercive, that would otherwise be made by the Board.

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11. The United States appears to disclaim any argument that the NLRA actually protects employer speech. *See* Br. for United States at 26.

This Court has never endorsed the United States' novel theory that state law cannot regulate any conduct that also is regulated by federal labor law, even where such regulation occurs, as the United States concedes, "on a different axis." Br. for United States at 24. To the contrary, it has recognized that "[c]onsiderations of federal supremacy" are less important when states regulate conduct that is also prohibited by the NLRA than when states regulate NLRA-protected conduct. *Sears*, 436 U.S. at 200; *see also Linn*, 383 U.S. at 66 (no federal conflict arises merely because "the Board and state law frown upon" the same conduct "for different reasons"). Accordingly, state regulation of conduct prohibited by the NLRA is preempted only where such regulation serves "as a means of enforcing the NLRA" itself, *Gould*, 475 U.S. at 286, and thus endangers "uniform, nationwide interpretation of the federal statute by the centralized expert agency created by Congress," *N.Y. Tel. Co.*, 440 U.S. at 528. But state regulation that only incidentally touches upon conduct that is also regulated by the NLRA implicates none of the concerns articulated by *Garmon*, and so is not preempted, where the state inquiry has no overlap with the federal inquiry and so interferes not at all with the Board's unfair labor practices jurisdiction. This Court therefore has declined to find state law preempted where "the respective controversies presented to the state and federal forums would not have been the same." *Sears*, 436 U.S. at 196-97.

In *Sears*, for example, this Court declined to preempt an employer's state-law trespass claim against a union that was picketing the employer's property,

notwithstanding that the picketing was arguably either prohibited or protected by the NLRA. It reasoned that any claim by the employer that the picketing was prohibited would turn on "whether the picketing had a recognitional or work-reassignment objective," whereas the trespass claim turned on "the location of the picketing" and would not take into account "whether the picketing had an objective proscribed by federal law." *Id.* at 198. Moreover, there was no means by which any dispute over whether the picketing was protected by the Act could be presented to the Board, and so "the primary-jurisdiction rationale does not provide a sufficient justification for pre-empting state jurisdiction." *Id.* at 202 (emphasis omitted).

On its face, California's law does not ask whether employer expression is coercive — the question that would concern the Board — and so there is no obvious risk that the Board and a California court would reach inconsistent results. Straining nonetheless to find an overlap between the state-law inquiry and the federal-law inquiry, the United States argues that a state court applying California's law would first have to ascertain whether the employer activity at issue was coercive, because regulation of non-coercive speech is preempted pursuant to the *Machinists* doctrine. *See* Br. for United States at 25. In effect, the United States asks this Court, in the guise of applying *Machinists*, to rewrite California's law to ban only conduct already banned by the NLRA and to require the same inquiry by the state courts that would be made by the Board, at which point the law would be preempted by *Garmon*. But because

Machinists does not apply, *see supra* Section C.1, the premise of the United States' argument is mistaken.[12]

California's law is tailored to complement, rather than conflict with, federal policy. Substantively, it is no more than a state analog to the federal policy of not funding speech intended to influence unionization decisions. Procedurally, it is no threat to uniform enforcement of any federal policy, because it requires a state court to ask none of the same questions that would concern the Board. There is no reason to apply *Garmon* preemption here.

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12. Moreover, state laws of broader application may not be judicially rewritten in a way that requires state courts to inquire into whether the NLRA would apply, for that "would invite precisely the harms that the pre-emption doctrine is designed to avoid." *N.Y. Tel. Co.*, 440 U.S. at 529 n.15.

CONCLUSION

This Court should affirm the judgment of the court of appeals.

Respectfully submitted,

ANDREW M. CUOMO
Attorney General of the State of New York
BARBARA D. UNDERWOOD*
Solicitor General
BENJAMIN N. GUTMAN
Deputy Solicitor General
SASHA SAMBERG-CHAMPION
Assistant Solicitor General
120 Broadway, 25th Floor
New York, NY 10271
(212) 416-8020

Attorneys for Amici Curiae

* *Counsel of Record*

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RICHARD BLUMENTHAL
Attorney General
State of Connecticut
55 Elm Street
Hartford, CT 06106

BILL MCCOLLUM
Attorney General
State of Florida
The Capitol, PL-01
Tallahassee, FL 32399-1050

LISA MADIGAN
Attorney General
State of Illinois
100 West Randolph Street
12th Floor
Chicago, IL 60601

THOMAS MILLER
Attorney General
State of Iowa
Hoover Building, 2nd Floor
1305 East Walnut Street
Des Moines, IA 50319

JACK CONWAY
Attorney General
State of Kentucky
Suite 118
Capitol Building
700 Capitol Ave.
Frankfurt, KY 40601

G. STEVEN ROWE
Attorney General
State of Maine
Six State House Station
Augusta, ME 04333-0006

MARTHA COAKLEY
Attorney General
State of Massachusetts
One Ashburton Place
Boston, MA 02108

LORI SWANSON
Attorney General
State of Minnesota
102 State Capitol
75 Rev. Dr. Martin
Luther King, Jr. Boulevard
St. Paul, MN 55155-1609

JEREMIAH W. (JAY) NIXON
Attorney General
State of Missouri
Supreme Court Building
207 West High Street
Jefferson City, MO 65101

MIKE MCGRATH
Attorney General
State of Montana
P.O. Box 201401
Helena, MT 59620-1401

CATHERINE CORTEZ MASTO
Attorney General
State of Nevada
100 North Carson Street
Carson City, NV 89701

GARY G. KING
Attorney General
State of New Mexico
P.O. Drawer 1508
Santa Fe, NM 87504

MARK DANN
Attorney General
State of Ohio
30 E. Broad Street,
17th Floor
Columbus, OH 43215

HARDY MYERS
Attorney General
State of Oregon
1162 Court Street N.E.
Salem, OR 97301

PATRICK C. LYNCH
Attorney General
State of Rhode Island
150 South Main Street
Providence, RI 02903

DARRELL V. MCGRAW, JR.
Attorney General
State of West Virginia
Office of the Attorney General
State Capitol, Room 26-E
Charleston, WV 25305

BRUCE A. SALZBERG
Attorney General
State of Wyoming
123 State Capitol
Cheyenne, WY 82002